

BRIEFING ON IMPROVING THE ENDANGERED SPECIES ACT: PERSPECTIVES FROM THE FISH AND WILDLIFE SERVICE AND STATE GOVERNORS

HEARING

BEFORE THE

SUBCOMMITTEE ON FISHERIES,
WATER, AND WILDLIFE

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

SEPTEMBER 29, 2015

Printed for the use of the Committee on Environment and Public Works



Available via the World Wide Web: <http://www.gpo.gov/fdsys>

U.S. GOVERNMENT PUBLISHING OFFICE

98-669 PDF

WASHINGTON : 2016

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED FOURTEENTH CONGRESS
FIRST SESSION

JAMES M. INHOFE, Oklahoma, *Chairman*

DAVID VITTER, Louisiana	BARBARA BOXER, California
JOHN BARRASSO, Wyoming	THOMAS R. CARPER, Delaware
SHELLEY MOORE CAPITO, West Virginia	BENJAMIN L. CARDIN, Maryland
MIKE CRAPO, Idaho	BERNARD SANDERS, Vermont
JOHN BOOZMAN, Arkansas	SHELDON WHITEHOUSE, Rhode Island
JEFF SESSIONS, Alabama	JEFF MERKLEY, Oregon
ROGER WICKER, Mississippi	KIRSTEN GILLIBRAND, New York
DEB FISCHER, Nebraska	CORY A. BOOKER, New Jersey
MIKE ROUNDS, South Dakota	EDWARD J. MARKEY, Massachusetts
DAN SULLIVAN, Alaska	

RYAN JACKSON, *Majority Staff Director*
BETTINA POIRIER, *Democratic Staff Director*

SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE

DAN SULLIVAN, Alaska, *Chairman*

JOHN BARRASSO, Wyoming	SHELDON WHITEHOUSE, Rhode Island
SHELLEY MOORE CAPITO, West Virginia	THOMAS R. CARPER, Delaware
JOHN BOOZMAN, Arkansas	BENJAMIN L. CARDIN, Maryland
JEFF SESSIONS, Alabama	BERNARD SANDERS, Vermont
ROGER WICKER, Mississippi	KIRSTEN GILLIBRAND, New York
DEB FISCHER, Nebraska	CORY A. BOOKER, New Jersey
MIKE ROUNDS, South Dakota	EDWARD J. MARKEY, Massachusetts
JAMES M. INHOFE, Oklahoma (<i>ex officio</i>)	BARBARA BOXER, California (<i>ex officio</i>)

C O N T E N T S

Page

SEPTEMBER 29, 2015

OPENING STATEMENTS

Enzi, Hon. Mike B., U.S. Senator from the State of Wyoming	1
Daines, Hon. Steve, U.S. Senator from the State of Montana	2
Tester, Hon. Jon, U.S. Senator from the State of Montana	3
Sullivan, Hon. Dan, U.S. Senator from the State of Alaska	4
Inhofe, Hon. James M., U.S. Senator from the State of Oklahoma, prepared statement	6

WITNESSES

Ashe, Dan, Director, U.S. Fish and Wildlife Service	6
Prepared statement	9
Responses to additional questions from Senator Inhofe	15
Mead, Matt, Governor, State of Wyoming, Chairman, Western Governors' Association	34
Prepared statement	38
Responses to additional questions from Senator Inhofe	73
Bullock, Steve, Governor, State of Montana, Vice Chairman, Western Governors' Association	76
Prepared statement	78
Responses to additional questions from Senator Inhofe	88

BRIEFING ON IMPROVING THE ENDANGERED SPECIES ACT: PERSPECTIVES FROM THE FISH AND WILDLIFE SERVICE AND STATE GOVERNORS

TUESDAY, SEPTEMBER 29, 2015

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE,
Washington, DC.

The committee met, pursuant to notice, at 2:04 p.m. in room 406, Dirksen Senate Office Building, Hon. Dan Sullivan (chairman of the subcommittee) presiding.

Present: Senators Sullivan, Barrasso, Capito, Boozman, Fischer, Rounds, and Inhofe.

Also present: Senators Enzi, Daines, and Tester.

Senator SULLIVAN. The Subcommittee on Fisheries, Water, and Wildlife will now come to order.

We have a couple special guests here who are going to help us open this hearing, Senators Enzi, Tester and Daines. So I welcome my colleagues to make a few opening statements before Director Ashe and some of our Western Governors assume the dais.

Senator Enzi.

OPENING STATEMENT OF HON. MIKE B. ENZI, U.S. SENATOR FROM THE STATE OF WYOMING

Senator ENZI. Thank you, Mr. Chairman.

It is a great honor that I join with Senator Barrasso this afternoon to introduce Wyoming Governor Matt Mead. Governor Mead presented earlier today before the Senate Commerce Committee, so I guarantee that he is warmed up for your questions. He has a great deal of expertise to share with the subcommittee on wildlife management and the need to improve the Endangered Species Act.

He can speak to great detail about the efforts the Western States went through with the recent decision on the greater sage-grouse. Governor Mead can also speak to Wyoming's successes with species recovery, including the black-footed ferret, which is particularly interesting because Wyoming is the first State to save an extinct species. It had already been declared extinct. We found a few of them in Wyoming. Wyoming built a special facility, captured the remaining ones, and did a special breeding program to get as much diversity as possible, and those are now in prairie dog towns throughout the West.

He has also been very involved in the wolf situation. We had an experimental population put in Yellowstone Park which has expanded greatly, and the State, out of concern for its wildlife and its agriculture, did a plan, and that plan got approved by Fish and Wildlife Service. Of course, then it was taken to court, and the decision of the judge is real interesting because she points out that while the Wyoming plan did what it was supposed to do, which is to increase the number of wolves and decrease the human and animal conflict, she didn't think the wording was strict enough. So it is in limbo at the moment.

We have also been involved with grizzly bears, which are expanding into communities at the moment. So there needs to be some things done with it, and he is an expert on things that could be done.

Now, I also applaud this committee's efforts to consider the merits of modernizing the Endangered Species Act. This is the second time I have appeared before the EPW Committee this year on the topic, and I am pleased that Chairman Inhofe is considering a wide variety of approaches. That includes S. 736, the State Tribal and Local Species Transparency and Recovery Act, which I introduced earlier this year to ensure that the Federal Government consider scientific data collected from State, local, and tribal authorities when making ESA determinations.

As you are aware, Governor Mead will focus on endangered species as his initiative while serving as chairman of the Western Governors' Association. In addition to the current efforts in Congress, this initiative is an important step toward identifying how to turn the Endangered Species Act into a workable recovery program for our wildlife populations.

I am pleased Governor Mead could join the subcommittee this afternoon, and I am looking forward to his suggestions on this important Act.

Thank you, Mr. Chairman.

Senator SULLIVAN. Thank you, Senator Enzi.

Senator Daines.

**OPENING STATEMENT OF HON. STEVE DAINES,
U.S. SENATOR FROM THE STATE OF MONTANA**

Senator DAINES. Chairman Sullivan, Ranking Member Whitehouse, Chairman Inhofe, and Ranking Member Boxer, thank you for holding this important briefing today about the Endangered Species Act.

I would also like to welcome our own Governor from Montana, Governor Steve Bullock, to our Nation's capital, and I thank you for making the trip out and for testifying here today.

There aren't many Federal laws that impact our great State more than the Endangered Species Act, with 18 species listed as threatened, endangered, or candidate species, and some for nearly 50 years.

Our great State is known for its one-of-a-kind wildlife and also its bountiful agriculture and natural resources, and it is important that land management decisions take into consideration both wildlife habitat and responsible land use, because too often land management, especially on the Federal level, is impacted by litigation

fueled by the Endangered Species Act. We see this most often in our national forests in Montana. Between 40 and 50 percent of timber volume has been halted by litigation in recent years.

All the while the ESA has only recovered less than 2 percent of the species that have been listed. These unacceptable results should compel reform. Though well intended, the ESA is like a 40-year-old ranch pickup: it once served a useful purpose, but it is in bad need of repair.

As we think about wolves, as Senator Enzi just mentioned, I am grateful that Montana now manages wolves and wolf populations. It literally took an act of Congress to make that change. But now the people of Montana, State Fish, Wildlife and Parks, we manage wolf populations in Montana. In fact, I have my wolf tag for 2015 with me. Montanans can go down and buy a tag over the counter or online, because the people of Montana now are managing that wolf population. We know how to do it.

One species that has had a lot of focus for many Montanans is the greater sage-grouse. Although we are happy with the recent unwarranted determination by the Fish and Wildlife Service, many Montanans remain concerned about the BLM's land use plans, and we certainly commend Governor Bullock and the Montana legislature for their work to launch Montana's greater sage-grouse conservation plan, an unprecedented effort between Montana land users and conservation groups.

I look forward to our State plan being up and running this January, and I truly appreciate the committee for exploring how States can take the lead in the sage-grouse conservation.

Thank you.

Senator SULLIVAN. Senator Tester.

**OPENING STATEMENT OF HON. JON TESTER,
U.S. SENATOR FROM THE STATE OF MONTANA**

Senator TESTER. Well, thank you, Chairman Sullivan. It is great to be here today and it is an incredible opportunity for me to introduce my friend, the Governor of the State of Montana, Steve Bullock. Steve has been a friend and a reliable partner for bipartisan ship in his time both when he served as attorney general with you, Senator Sullivan, and now as Governor. He knows that hard work is accomplished in the middle, and when we compromise, things get done.

Montana is reaping those benefits. The State's economy is in good shape; balanced budget and \$400 million in the bank in a rainy day fund, and Montana is striking the right balance between conservation and economic growth. Montana, under the Governor's leadership, has done great work to conserve species, to ensure that they don't become threatened in the first place. Two examples are the Arctic grayling and the sage-grouse.

Steve is here to discuss the collaboration and the pragmatism that went into conserving habitat both from a government and from a private sector.

Montana has leveraged Federal resources with its own funding in tools like the Candidate Conservation Agreements with private landowners to reduce areas of conflict and to find solutions with broad benefits, and that is how it should be. We should strengthen

the State and Federal partnerships, and we also need to ensure that the intent of bedrock laws like the Endangered Species Act remains both a backstop and a catalyst for action.

We almost missed our chance with the sage-grouse. The unprecedented effort from folks like Governor Bullock, from private landowners, from conservationists, from industry and governments at all level have protected a landscape that is fundamental to our Western way of life. In a sentence, collaboration on the ground works, as we have proven it here again.

I want to thank you again, Mr. Chairman, and it is a pleasure to introduce the Governor of the great State of Montana, Steve Bullock.

Senator SULLIVAN. Thank you, gentlemen, for your opening statements.

I am now going to have Director Ashe assume the table.

**OPENING STATEMENT OF HON. DAN SULLIVAN,
U.S. SENATOR FROM THE STATE OF ALASKA**

Senator SULLIVAN. Good afternoon.

As you have seen from our opening statements from my Senate colleagues, the purpose of the meeting today is to examine the Endangered Species Act and how it can be improved and updated for the 21st century. Today we are fortunate to have an impressive slate of witnesses: Director Ashe; two Governors who were just introduced, who I think can bring a lot to bear with regard to the importance of the States' involvement with regard to the Endangered Species Act.

As Alaska's Senator, I want to make a point about something that happened yesterday that might not seem to relate to the ESA, but it does.

We had an announcement in terms of offshore development where a large company, Shell, in terms of responsibly developing oil resources off the coast of Alaska, is pulling out, for now. There is a lot to that, but one thing that they certainly mentioned was the uncertainty in the Federal regulatory environment. This is a company that spent 7 years and \$7 billion to try to get Federal permission to drill one exploration well in 100 feet of water. That kind of Federal permitting delays doesn't help anyone in our country.

So I think a lot of people, a lot of Senators on both sides of the aisle, are looking at opportunities to make our regulatory system more efficient, timely, and certain, while balancing the needs, certainly, which we all agree to protect our species, but also to protect jobs and the private sector.

So that is what we are going to look at today.

The ESA was first enacted in 1973 and hasn't been modernized or comprehensively updated since 1988. Think about that. That is a long time for a statute of this importance.

Like a lot of legislation passed many decades ago, it is in need of an update and modernization to, again, protect species, certainly, which is what it is focused on, but to balance other important issues that I think all of us would agree are necessary to consider.

Too often, as my colleagues in the Senate have already mentioned, the ESA has been used and abused, more as a political weapon, more as a means to lock up land by litigants who sue

under it, more as a means to be used as a land zoning device, as opposed to what it was initially, and I think with widespread agreement, focused on doing, which is protecting our species.

Since its passage, the nearly 1600 domestic species that have been added to the endangered species list, less than 2 percent, as Senator Daines mentioned, have recovered.

There are those who do not agree that the ESA is in need of improvement, but recovering less than 2 percent of listed species is not good enough, and we must do better.

Adding more and more species to the list shouldn't be the goal or the end of the story. The key is recovering species from population collapses. That should be the goal.

We had a recent example in Alaska, where we worked with the Federal agencies to delist the eastern stock of the Steller sea lion, which had dramatically, by thousands, close to tens of thousands, recovered; and that was delisted, and we are proud of that fact in Alaska.

But even more surprising is that many species listed on the ESA do not even have a published or recovery plan. So there is no plan, which, again, is part of the ESA.

How can the agencies move forward recovering species if we don't have any idea or plan on how to do that?

Many of the agencies have limited resources and are spending most of their resources not on these plans, but in court, in litigation, which has come to be synonymous with the Endangered Species Act.

In May, at a full committee hearing, Director Ashe offered the following. He said, "I do believe that the Endangered Species Act should be reauthorized, and I think there could be room for improvement of the law. I think it is possible to bring people of good will together and we could pass legislation that improves the law." In many ways, that was a genesis of this hearing.

Similarly, as I believe we will see today, the bipartisan Western Governors' Association passed a resolution that states, "Western Governors believe the ESA can only be reauthorized through legislation developed in a consensus fashion that results in broad bipartisan support and means the intent of the Act."

In my experience, the ESA is often more of a geographic issue than a partisan issue, where Western Governors, Western AGs, regardless of party in the Western States, believe in the need and importance of reform. They also believe in the importance of more State involvement in the ESA and the ESA listing process. The ESA itself states that States shall be consulted. But oftentimes it is a very cursory consultation process, even though, as I think we will see today from some of our witnesses, the States often have better information and better knowledge of the species and how to recover and protect them than does the Federal Government.

As Alaska's attorney general, I served with Governor Bullock, and we worked together, again, in a bipartisan way, many of us, to launch the Endangered Species Working Group of the Western Association of Attorneys General, again, a bipartisan group that was very focused on this important issue. We sought to achieve common ground, and we hope that part of today's hearing will have ideas and a way to move forward on that common ground.

Working together, Congress can update, modernize, and reform the ESA to incorporate innovative solutions that result in increased species recovery and less impact to the economy, private property, and jobs throughout our country.

I want to thank the witnesses again for being here. Look forward to discussing this important topic and exchanging ideas with all of them.

Senator INHOFE. Mr. Chairman, I know you are going to get to the opening statement of Director Ashe. This is a subcommittee meeting, and I am not going to read an opening statement. I would like to submit one for the record, though, all right?

Senator SULLIVAN. Without objection.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE,
U.S. SENATOR FROM THE STATE OF OKLAHOMA

I would like to start by thanking Senator Sullivan for putting this briefing together. I'd also like to thank our guests, Director Ashe, and Governor Mead and Governor Bullock. I appreciate your time and participation today so that we all can get a better understanding of the Endangered Species Act and how we can improve this legislation.

The Endangered Species Act has been in the news often recently. Earlier this month, a Federal district judge held that the Fish and Wildlife Service did not fully evaluate ongoing conservation methods in its decision to list the lesser prairie chicken. This is a victory for State and local conservationists who know that they can positively impact species recovery and ecosystem management without the Washington bureaucrats.

Then just last week the Fish and Wildlife Service announced that the greater sage-grouse is not in need of Federal protection under the Endangered Species Act. It appears, however, that the Administration will continue to control sage-grouse habitat by greatly restricting land use, thereby removing State and local governments from the conservation process. I hope we are able to have a discussion today about the future of State conservation and how we can include more local efforts into the recovery of threatened and endangered species.

Last time Director Ashe joined us for a hearing, we heard from six Senators about their legislation and examined eight different bills to reform the ESA. Director Ashe said that we "could pass legislation to improve the act." We also heard from other witnesses that the current one-size-fits-all approach does not work. The discussion today will build on that hearing with input from State Governors and an examination of the Service's proposal to change the listing process.

I also look forward to hearing about the work the Western Governors' Association has done to address ESA overreach in their States. We are fortunate today to have both a Republican and a Democrat Governor talk about how current implementation of ESA works and what problems they have with it in their States. We must address the fact that the Service spends more time and resources fighting lawsuits and listing species than actually recovering and delisting species. If States and local conservationists had a larger role in the process, we could use our resources much more efficiently to ensure that our precious ecosystems continue to thrive.

I hope to work with our Governors and the Service to develop a bipartisan legislative proposal to address these needs and to put the ESA back to work for species recovery. Again, I thank everyone for coming today, and I look forward to your testimonies.

Senator SULLIVAN. Director Ashe, your opening statement, please.

**STATEMENT OF DAN ASHE, DIRECTOR, U.S. FISH AND
WILDLIFE SERVICE**

Mr. ASHE. Good afternoon, Mr. Chairman and committee members. It is always a pleasure to be here.

The Endangered Species Act is among the Nation's and the world's most aspirational, important, and successful environmental

laws. Think about what has happened since its enactment in 1973. World population has grown by more than 3 and a half billion, nearly double. And here in the U.S. over 100 million people have been added to our population, nearly a 50 percent increase. And these people are more affluent. Real GDP in the U.S. has grown threefold since 1973, and per capita GDP has doubled in that same period.

So we have more people and more people consuming more resources, which means, quite simply, that less resources are available to support the rest of what we call biological diversity. So we implement this law, facing the challenge of what many are calling the sixth mass extinction.

But notwithstanding that, I believe that we have forged amazing success. Ninety-nine percent of listed species have been saved from extinction. Of the species that have been listed for more than 5 years, 90 percent are holding stable or increasing in population.

During this Administration, I think that we have shown what is possible if we invest in Endangered Species Act success. We are incentivizing private conservation. Perhaps a seminal innovation of this Administration is our partnership with the United States Department of Agriculture Natural Resource Conservation Service, what we are calling Working Lands for Wildlife. Our success in Arctic grayling and lesser prairie-chicken and New England cottontail and the greater sage-grouse, which we celebrated last week, are all rooted in this key collaboration to incentivize private land conservation, voluntary private land conservation.

We are engaging the States. We have established a joint ESA task force between the Fish and Wildlife Service and the Association of Fish and Wildlife Agencies. We helped to form a five-State range-wide plan to support the conservation of the lesser prairie-chicken, relying on State-based authorities to achieve conservation. We have framed an incidental task authorization agreement with the State of Florida, the first of its kind.

And with the greater sage-grouse effort, which I just mentioned, we worked for over a decade with the Western Association of Fish and Wildlife Agencies, deferring to their scientific expertise on the sage-grouse. We worked with the range States to develop a conservation objectives team report, which was the foundation for the not warranted determination which we reached. We did that with our State partners and we joined arm-in-arm with the Western Governors' Association to form a Federal-State joint task force to address the conservation needs of the greater sage-grouse, which was, again, foundational to our success.

We are building collaborative science capacities in a landscape conservation cooperative network, and that network is driving an innovative southeastern conservation blueprint involving all of our State partners across the Southeast, designing a blueprint through which we will work cooperatively to avoid the need to list species in the future.

We are recovering and delisting species at a record setting pace by strategically targeting our investments. We have recovered and delisted more species than any previous Administration, and continuing on this pace we will have recovered and delisted more species than all previous Administrations combined.

Where we invest, we succeed.

As a long-time friend and colleague, Don Berry said recently, in testimony before this committee, the Endangered Species Act is not broken, it is starved. The seminal improvement that I believe Congress could make would be to adequately and aggressively fund the law's implementation; Federal implementation, State implementation. When we do, it works. In fact, it works quite well.

We saw it last week when we were together in Denver, and I was privileged to stand with Secretary Jewell, four Governors, two Democrat, two Republican, two of whom are testifying on the next panel, along with the National Audubon Society and a Nevada rancher.

And I will close there by saying that that rancher, Dwayne Coombs, summed it up best when he said, this is good Government. Amen.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Ashe follows:]

STATEMENT OF DAN ASHE, DIRECTOR
 U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR
 BEFORE THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, SUBCOMMITTEE
 ON FISHERIES, WATER, AND WILDLIFE ON THE ENDANGERED SPECIES ACT
 BRIEFING
 ON
 "IMPROVING THE ENDANGERED SPECIES ACT: PERSPECTIVES FROM THE FISH AND WILDLIFE
 SERVICE AND STATE GOVERNORS"

September 29, 2015

Good morning Chairman Sullivan, Ranking Member Whitehouse, and Members of the Subcommittee. Thank you for inviting me to brief the Subcommittee today on the Endangered Species Act (ESA). My testimony will focus on our successes under the ESA, as well as the changes we are undertaking administratively to improve the implementation of the ESA. Over the last four decades, the need for conservation of at-risk plants and animals across the nation has dramatically increased. We are in the midst of an extinction crisis. With the human population at a historic peak, wildlife must compete for decreasing habitat and resources. To help address the growing need to protect imperiled species, the ESA remains a critical and effective tool to protect our nation's wildlife heritage for future generations of Americans.

Overview of the Endangered Species Act

The Endangered Species Act is one of the nation's most important conservation laws. Since it was enacted by Congress in 1973, the ESA has successfully prevented the extinction of more than 99 percent of the species it protects, demonstrating that it does work. Its continued success is predicated upon the Service's partnerships with states, other Federal agencies and private landowners, as demonstrated by several recent conservation achievements, which I will later discuss. The ESA is implemented jointly by the U.S. Fish and Wildlife Service (Service) and the National Oceanic and Atmospheric Administration (NOAA).

Under the ESA, species like the California condor, grizzly bear, whooping crane, and black-footed ferret have all been brought back from the brink of extinction. In addition, the bald eagle, American alligator, Oregon chub, and many other species have fully recovered and no longer need protection under the law. Equally important, the landowner tools and collaborative approach that the Service and its many partners have brought to grassroots conservation efforts have stabilized and improved the condition of many other species, precluding the need to list them under the ESA. In protecting these species, the ESA is a powerful tool for conserving habitat that also benefits clean water and clean air, outdoor recreation, and our nation's natural and cultural heritage.

Today, hundreds of species are stable or improving thanks to federal, state and local agencies, conservation organizations, and citizens. The ESA's flexibility promotes voluntary partnerships to support America's unique wildlife and healthy economic development. By helping to sustain habitats treasured by hunters, anglers, birders, hikers and other outdoor enthusiasts, the ESA ensures that where wildlife thrives, people prosper.

Endangered Species Act Successes

America's fish, wildlife, and plant resources belong to all Americans, and ensuring the health of imperiled species is a shared responsibility for all of us. In implementing the ESA, the Service adheres rigorously to the statutory requirement that implementation of the law be based on the best available information. At the same time, the Service has been responsive to the need to develop flexible, innovative mechanisms to cooperate with states, private landowners, and others, both to preclude the need to list species where possible, and to speed the recovery of those species that are listed. The Service remains committed to conserving America's fish and wildlife by relying upon the best available science and working in partnership to achieve recovery.

Some aspects of that record are worth noting at the outset. Already in this Administration, more species have been taken off the endangered list due to recovery than in any prior Administration. Though still warranting protection, many other species – among them the California condor, black-footed ferret, whooping crane, Florida manatee, Kirtland's warbler, Kemp's ridley sea turtle, and Florida panther – have had their populations increase to or near their highest levels in decades. Scores of other species that were identified as candidates for federal protection, like the dunes sagebrush lizard, were ultimately determined not to need that protection as a result of conservation efforts spurred by the potential prospect of a listing under the law.

Through a multi-year listing work plan established in 2011, the Service has dramatically reduced the amount of litigation related to ESA and focused its limited resources on the conservation of candidate species for ESA protections. The work plan makes administration of the ESA more effective and efficient by enabling the agency to prioritize its workload based on the needs of at-risk species. It also provides federal and state agencies and landowners clarity and certainty about the timing of future listing determinations. The work plan has also catalyzed stakeholders to engage in conservation efforts to address species' needs before a listing decision is made. Some of the most recent successes include the greater sage-grouse, New England cottontail rabbit, and the arctic grayling.

Greater Sage-grouse

The Service's recent decision that the greater sage-grouse does not warrant protection under the ESA is the result of an unprecedented conservation partnership spread across the western United States. This partnership significantly reduces threats across 90 percent of the species' breeding habitat. Numerous federal agencies, the states in the range, and dozens of public and private partners undertook an extraordinary campaign to conserve the greater sage-grouse. Revisions to 98 federal land use plans were bolstered by development of state sage-grouse management plans in 10 of the 11 states in the sage-grouse range and by a voluntary, multi-partner private-lands effort that has protected high-quality sage-grouse habitat on millions of acres of ranches across the West. The goal was to ensure enough protection to reduce the threats to the species such that listing was not required, and the partnership succeeded in meeting that goal.

Additionally, in April 2015, the Service determined that the bi-state population of greater sage-grouse did not require the protections of the ESA. A key factor in the decision not to list this population was the development of The Bi-State Action Plan, a conservation plan developed by partners in the Bi-State Local Area Working Group over the past 15 years and secured with \$45 million in funding. The collaborative, science-based efforts in Nevada and California, and the comprehensive plan and funding commitments, set the stage for the next generation of conservation and give the Service confidence that the sage-grouse population will not become in danger of extinction in the Bi-State region.

The successes of various partnerships to conserve the greater sage-grouse demonstrate that the ESA is an effective and flexible tool that can be a tremendous catalyst for conservation, while giving the states and other partners the ability to plan for sustainable development of natural resources.

New England Cottontail

As the Service announced earlier this month, another example of a successful public-private partnership uniting foresters, farmers, birdwatchers, biologists, hunters and other conservationists worked to save the New England cottontail from needing protection under the ESA.

The partnership has also initiated on-the-ground conservation efforts for the cottontail that will benefit the rabbit into the future. The rabbit was classified as a candidate for ESA protection in 2006. Recognizing both the urgency and the opportunity to conserve the species, in 2008 state and federal biologists began a coordinated conservation effort that has fueled the species' path to recovery. That effort includes the development of a rangewide, science-based conservation strategy that has targeted ambitious but achievable goals.

Voluntary restoration efforts on private lands played a critical role in increasing and connecting early successional habitat. In the past three years, the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) has worked with owners and managers of private lands to restore more than 4,400 acres of habitat by removing trees and invasive species, planting native shrubs and creating brush piles.

Arctic grayling

The ESA brought the declining status of Montana's Arctic grayling into focus and empowered the Service to engage multiple federal and state agencies and landowners through a Candidate Conservation Agreement with Assurances, a voluntary program that gives regulatory assurances to private landowners in exchange for voluntary conservation measures. To date, 33 ranching families have implemented more than 250 conservation projects across 158,000 acres to benefit this freshwater fish, which significantly improved habitat conditions and led to the Service's August 2014 determination that Arctic grayling in the upper Missouri River drainage did not need ESA protection.

Oregon chub

Earlier this year, the Service published a final rule to recognize the recovery of, and remove from the protection of the ESA, the Oregon chub, a fish native to rivers and streams in the State of Oregon. The recovery of the Oregon chub is noteworthy because it is attributable in significant part to the cooperation of private landowners who entered into voluntary conservation agreements to manage their lands in ways that would be helpful to this rare fish. In some cases, landowners agreed to cooperate in reintroducing the fish into suitable waters on their property. The help of private landowners and the cooperation of state and federal partners were critical to the success in bringing this fish to the point at which it is no longer endangered and no longer in need of the protection of the ESA.

The recovery of the Oregon chub has taken a little more than 20 years of sustained effort. That is a relatively speedy time frame within which to undo the effects of habitat loss and degradation and the other threats that are responsible for the endangerment of many species. For comparison, the recovery and delisting of the bald eagle was the culmination of a 40-year conservation effort and the Aleutian Canada goose recovery took 34 years.

Louisiana black bear

This spring, thanks to a highly successful public-private partnership, the Service published a proposal to remove the Louisiana black bear from the list of threatened and endangered species under the ESA. For more than 20 years, the Service has partnered with the Louisiana Department of Wildlife and Fisheries, Natural Resources Conservation Service, University of Tennessee, private landowners and others to address the threat of habitat loss in the bear's range. This includes researching the status of the existing populations, establishing additional subpopulations, and protecting or restoring more than 750,000 acres of habitat. A large proportion of habitat supporting and connecting breeding subpopulations has been protected and restored voluntarily through private-landowner restoration efforts. Because of these voluntary conservation agreements with private landowners and public conservation agencies in the Tensas and Atchafalaya River basins providing long-term habitat protection, the Service has assurances that degradation is not likely to occur for at least 100 years.

Improving the Implementation of the Endangered Species Act

As I testified in May, the Administration is continuing to take steps to improve the implementation of the ESA. The Service is committed to making the ESA work for the American people to accomplish its purpose of conserving threatened and endangered species and protecting the ecosystems upon which they depend. As part of the Administration's ongoing efforts, the Service will be unveiling additional proposals over the coming year to achieve four broad goals:

- 1) Improving science and increasing transparency. To improve public understanding of and engagement in ESA listing processes, the Service will strengthen procedures to ensure that all information that can be publicly disclosed related to proposed listing and critical habitat rule notices will be posted online; and adopt more rigorous procedures to ensure consistent, transparent, and objective peer review of proposed decisions.

- 2) Incentivizing voluntary conservation efforts. Voluntary conservation programs, such as Safe Harbor agreements and Candidate Conservation Agreements, can improve conditions for listed and at-risk species, and conservation banking can make listed species and their habitats assets for landowners. The Service will update guidance on the use of these proactive tools to establish consistent standards; and adopt a policy promoting the expanded use of conservation banking and other advance mitigation tools.
- 3) Focusing resources to achieve more successes. The Service will work to focus limited resources on activities that will have the greatest impact. These actions include proposed revisions to interagency consultation procedures to streamline the process for projects, such as habitat-restoration activities, that result in a net conservation benefit for the species and updates to the Habitat Conservation Planning Handbook to make developing and permitting plans more efficient and timely.
- 4) Engaging the States. State fish and wildlife agencies, by virtue of their responsibilities and expertise, are essential partners in efforts to conserve threatened and endangered species. The Service has proposed revised petition regulations to give states an opportunity to provide input prior to submission; and will update policy regarding the role of state agencies to reflect advancements in collaboration between the Service and the States.

These proposals add to other actions already in progress, such as finalizing a policy on prelisting conservation credits and updating our regulations and policy regarding critical habitat designations. Efforts to make the ESA work better will also include additional future review and update of regulations and policy, consistent with President Obama's Executive Order 13563, Improving Regulation and Regulatory Review, and is outlined in the Department of Interior's Preliminary Plan for Retrospective Regulatory Review.

As the Administration moves forward with efforts to improve the implementation of the ESA, the most significant step that Congress can take in improving effectiveness of the ESA is to provide the resources needed to get the job done in the field. To that end, we ask that Congress support the President's budget request for Fiscal Year 2016.

Conclusion

In the last six years, almost two dozen species have both been recovered and delisted, or are now proposed for delisting. There have also been more than a dozen imperiled species that were candidates for listing under the Act that have been conserved through proactive efforts and no longer require consideration for listing. They include the Bi-State population of the greater sage-grouse, the Montana population of arctic grayling, and the Coral Pink Sand Dunes tiger beetle. Most importantly, nearly all of the plants and animals protected by the ESA are still with us. They still have a fighting chance for survival, despite the many threats that beset them.

The ESA was enacted in 1973 to protect plants and animal species threatened with extinction. While the challenges we face now are large and daunting, the Act has been extraordinarily

effective in preventing extinctions and has spurred unprecedented voluntary species conservation efforts across the nation. The Service will continue to focus its efforts on ways to improve the implementation of the Act to conserve those species at risk of extinction.

Thank you for your interest in endangered species conservation and ESA implementation, and for the opportunity to testify.

**Senate Committee on Environment and Public Works
Subcommittee on Fisheries, Water, and Wildlife
Briefing entitled, “Improving the Endangered Species Act: Perspectives from the
Fish and Wildlife Service and State Governors”
Questions for the Record for Director Dan Ashe
September 29, 2015**

Chairman Inhofe:

1. Would you consider any portion of the Service’s Notice of Proposed Rulemaking from May an attempt to repeal the ESA?

Response: No, the Fish and Wildlife Service (Service) sees these proposed revisions as improving implementation of the Endangered Species Act (ESA). We are committed to implementing the ESA for the American people to accomplish its purpose of conserving threatened and endangered species and protecting the ecosystems upon which they depend. When Congress enacted the ESA, it recognized the value of species to the Nation, the fact that various species have been rendered extinct and others are in danger of or threatened with extinction, and the importance of conserving imperiled species and the habitats they depend upon for survival. Since that time, the pace and extent of environmental change has placed us in the midst of an extinction crisis, which threatens the continued existence of our Nation’s biological wealth. To address these growing challenges, it is imperative we have an effective, collaborative approach to conserving imperiled species. In implementing the ESA, the Service adheres rigorously to the congressional requirement that implementation of the law be based on the best available science. The proposed revisions to the regulations concerning petitions, published on May 21, 2015, are intended to improve the content and specificity of petitions that the Service receives, including the scientific content, which will enhance the efficiency and effectiveness of the petition process as a tool for species conservation. Our proposed revisions are designed to assist petitioners in improving the quality of petitions through expanded requirements for complete information on status, trends, and information on degree of threats; and, in doing so, better focus the Service’s energies on petitions that merit further analysis.

2. On Monday, the Service published a recovery plan for the Bull Trout. That species was listed under the Endangered Species Act in 1999. Why did the recovery plan take 16 years to publish? How can we make this process more efficient to ensure a focus on recovery of species, not just listing?

Response: The Service recognizes that the time required to finalize this recovery plan—16 years—is longer when we would like. The Service is committed to developing and implementing processes to streamline and facilitate recovery planning and implementation. However, in this case, the timeframe is largely due to inherent complexities in the coordination of bull trout recovery due to its broad range, which spans five states and the jurisdictions of numerous Federal, state, Tribal, and local land managers. It is important to note that the absence of a published recovery plan did

not mean no efforts were underway to recover the bull trout; the Service has worked closely with partners to implement recovery actions while the recovery plan was being developed and finalized.

On November 1, 1999, the bull trout (*Salvelinus confluentus*) was listed as threatened within its range in the contiguous United States. In 2002, a draft recovery plan with 24 units was completed that addressed bull trout populations within the Columbia, Saint Mary-Belly, and Klamath Rivers. This was followed in 2004 with the development of an additional draft recovery plan with three recovery units, which covered the coastal and Puget Sound drainages in western Washington and the Jarbidge River in Nevada. Although the 2002 and 2004 draft recovery plans were not finalized, they served to identify recovery actions across the range of the species and provided the framework for the Service, partner agencies, and local working groups to implement numerous recovery actions in advance of a final plan being published.

Subsequently, the primary focus of the Service shifted for several years toward completion of a 5-year status review (completed in 2008) and designation of critical habitat (critical habitat rules published in 2004 and 2005, with a revised rule published in 2010). The analyses supporting these status review and critical habitat efforts led to a reconsideration of recovery unit structure, modifying the 27 recovery units used in the original draft recovery plans to comprise 6 larger recovery units (Coastal, Klamath, Columbia Headwaters, Upper Snake, Mid-Columbia, and St. Mary).

Beginning in 2010, the Service and partners engaged in recovery plan development based on this new recovery unit structure and following a new recovery planning approach. The revised draft recovery plan was published in September 2014 for public review. After extensive coordination with stakeholders, drafts of the six Recovery Unit Implementation Plans (RUIPs) were published for public review in June 2015. The final recovery plan and six separate stand-alone RUIPs were published in September 2015.

As previously mentioned, the Service is developing and implementing processes to streamline and facilitate recovery planning and implementation. These efforts include developing a species status assessment using a framework that can be used for the listing process as well as recovery planning and implementation. This approach will allow the Service to develop and update recovery plans more quickly.

3. What actions will the Service take in light of the court action on LPC?

Response: On September 1, 2015, Judge Junell, U.S. District Court, Western District of Texas, issued a ruling vacating the FWS final listing rule for the lesser prairie-chicken. The Service is considering our options in conjunction with our legal counsel. As a first step, on September 29, 2015, the Department of Justice and the Service filed in the U.S. District Court (Western District of Texas) a Motion to Amend the Judgment. Judge Junell held a hearing on November 12, 2015, on the Motion to Amend the Judgment and ordered the parties to enter into mediation by January 14, 2016.

4. Do you believe that the Service is too quick to make determinations and should first show more confidence in letting state and local conservation demonstrate results?

Response: The Service strongly supports local and state conservation efforts, and to the best of our ability, with available resources, we seek to work with state and local governments and private citizens to encourage conservation efforts that help stabilize species that are at risk but not yet on the ESA list. A current example of such an effort is our work across many states and Canada and Mexico to restore habitat to reverse a precipitous decline in monarch butterfly populations. This butterfly is not protected by the ESA in any way (i.e., it is not listed), and we are working to encourage and support local, state, and individual conservation efforts that can help keep the monarch off the endangered species list.

However, the Service must comply with the ESA requirements when conducting listing determinations. The ESA sets forth clear timelines for making listing determinations and requires that all listing determinations be made on the best information available at the time that the decision is made. For example, if the Service is petitioned to list a species, then there is a statutory timeframe for responding to the petition. As such, FWS, by statute, cannot wait beyond the timeframe that the statute allows to make a decision, even if such waiting would allow them to collect more information concerning the status of the species or conservation efforts.

Since 2011, our listing determinations have focused on species that are on the candidate list. These are species that the Service has already determined warrant listing, and most of them were on the candidate list for many years. In the case of the lesser prairie-chicken, the species had been a candidate for listing under the ESA since 1998, and the threats on the landscape have persisted and intensified. For more than a decade we worked closely with the five range states of Oklahoma, New Mexico, Texas, Kansas, and Colorado on conservation efforts for the species, including through the States' Service-endorsed Lesser Prairie-Chicken Range-wide Conservation Plan (RWP). The RWP represented a landmark conservation effort that is meant to address threats not covered or addressed by other conservation efforts across the five state range, such as oil and gas development and wind energy development.

5. Is the Service willing to let state and local conservation efforts work now rather than attempting to reimpose a listing that the courts invalidated?

Response: The Service greatly appreciates the efforts of our Federal and state partners, as well as industry and private landowners to conserve the lesser prairie-chicken and its habitat. We endorse the states' voluntary conservation plan for the lesser prairie-chicken, because we believe that full implementation of the plan will contribute to conservation of the species. We also support other voluntary conservation efforts such as the Natural Resources Conservation Service's Lesser Prairie-Chicken Initiative. The Government, however, has filed a motion to amend the judgment in the U.S. District Court, because the lesser prairie-chicken still warrants listing due to its low population, fragmented habitat, and threats that continue to exist.

6. On September 4, 2015 the U.S. Court of Appeals for the Fifth Circuit reversed convictions of CITGO Petroleum Corporation (US. v. Citgo Petroleum Coro), and in doing so placed potentially significant limits on the scope of strict criminal liability under the 1918 Migratory Bird Treaty Act for unintended killing of migratory birds. As you know, the Service is currently working on a Programmatic Environmental Impact Statement to issue an incidental take permit program for over 1,000 species of migratory birds and one of the targets of that, as issued by the Notice of Intent, is oil and gas. Has this court decision influenced the premise under which the Service claims the MBTA gives them the authority to create this program?

Response: No. We disagree with the Fifth Circuit's holding in CITGO. Other circuit courts have affirmed the government's interpretation of the MBTA. We anticipate that our future rulemaking efforts will allow us to revisit the issue within the Fifth Circuit.

7. When can we expect a draft PEIS on an incidental take program for the MBTA?

Response: In the most recent update to the Unified Regulatory Agenda, we projected that the draft PEIS and proposed rule would be published in June 2016. We are working as quickly as possible to meet this deadline, though may revise that date in the next publication of the agenda in spring.

8. There is current an interim 4(d) rule in place for “threatened” listing of the northern long eared bat. When you estimate you will issue the final rule to be issued?

Response: We intend to publish the final 4(d) rule in early 2016.

9. As you know, loss of habitat is not the main threat to the NLEB’s existence, rather a fungal disease known as White Nose Syndrome. The current interim 4(d) rule has special allowances for the forestry industry, but not other industries, such as oil and gas. Are you considering expanding the rule?

Response: Due to the complexity of this issue, the volume of comments, and the limited time between proposing the 4(d) rule and the date that the final listing rule was required to be published, we decided to publish an interim 4(d) rule. This approach allowed incidental take exemptions to be in place when we listed the northern long-eared bat as a threatened species, and allowed us to solicit additional public comment (including from industries such as oil and gas), which we are fully considering as we prepare a final 4(d) rule.

10. In your opinion, what is the biggest problem with the ESA, and what action should Congress take to address that problem? (For all panelists)

Response: The conservation and recovery of listed species takes time and resources. The pace and extent of environmental change is accelerating, and it is threatening the continued existence of more and more of our Nation’s species and ecosystems. To

achieve conservation and recovery of species on the brink of extinction, effective, collaborative approaches to conservation are needed, as are resources to fund projects and partnerships that pilot recovery actions and lead by example. The best way for Congress to support better outcomes under the ESA is to appropriate requested funds for efficient implementation of the ESA and, more broadly, for conservation programs across the Federal government, which can help prevent the need for listing in the first place. Congress can support the Administration's budget request for FY 2016, which includes increases in ESA recovery, consultation, and listing accounts. By providing requested funding, Congress would be supporting recovery actions to enable the delisting or downlisting of some species, timely consultations by the Service, and a reduction in the backlog of listing actions. Additionally, this problem can be reduced by investing in Federal conservation programs within and outside the Service that reduce threats to species and their habitats, which can help prevent species from needing to be listed. The Congress can provide sufficient funding to support conservation across the Service, where all programs contribute to the conservation of imperiled species. For example, landscape-level conservation and data gained through applied science inform conservation actions on the ground. The declines of many listed species happened over decades; however, we do not have the luxury of time to reverse those declines. We must act quickly and effectively to prevent further extinctions by relying upon the best available science and working in partnership to conserve species and achieve recovery of listed species.

11. What affect do overly litigious environmental organizations have on your agency and your ability to focus your energy on species conservation and recovery?

Response: The Service is a litigation target for many groups, challenged frequently by industry, environmental organizations, states, tribes, and individual citizens. ESA-related litigation, particularly regarding our responsibilities for reviewing petitions to add or remove species from the lists of threatened and endangered species, making listing determinations, and designating critical habitat, is not a recent occurrence; such litigation has been a fact of life for the Service for nearly twenty-five years. Most of that litigation has challenged the pace and priorities of the Service in addressing a backlog of listing actions.

Most recently, as a result of three "mega-petitions" that overwhelmed the listing capacity of the Service and led to missed deadlines for petition findings for many species, the Service, through the Department of Justice, entered into mediation that ultimately led to the 2011 Multidistrict Litigation (MDL) settlement agreements.

The MDL settlements have accomplished our objectives of making our listing activities more certain and predictable, and allowing the Service to focus more of our limited resources on actions that provide the most conservation benefit to the species that are most in need of help. The MDL settlement committed the Service to nothing more than to make the listing determinations required by the ESA for 251 species on a workable schedule. The settlements did not commit the Service to add these species to the list; rather, they committed the Service to make a determination by date certain as to whether

listing was still warranted and, if so, to publish a proposed rule to initiate the rulemaking process of adding a species to the list.

The MDL settlement agreement has served to reduce deadline litigation. Through the agreement, the plaintiffs have agreed to substantially limit or eliminate their deadline litigation. Again, this allows the Service to use our objective, biologically-based priority system to establish our work priorities, rather than have our priorities overridden by litigation seeking to advance plaintiff's priorities.

Between 2008 and 2010, the Service was engaged in litigation for missed deadlines on petition findings for approximately 895 species. Since the MDL Agreements were approved and the Service made its work plan public, the Service has seen an almost 96 percent reduction in species subject to lawsuits filed for missed deadlines on petition findings. Of the species subject to those lawsuits, more than 40 percent are the result of lawsuits brought by industry plaintiffs.

The MDL provides predictability for stakeholders and local communities. Prior to the settlement agreements, stakeholders were in limbo while species were on the candidate list, unsure when the Service might pursue a listing determination on a candidate species. The settlements have allowed the Service to establish and make available to the public a multi-year schedule for listing determinations on our candidate species. Stakeholders know in advance, in some cases years in advance, when we will be reviewing these candidates to determine whether a listing proposal is still warranted.

The MDL settlements have served to encourage proactive conservation efforts by landowners, industry groups, local communities, and government agencies. Proactive conservation efforts can make an ESA listing no longer necessary, as was the case with the greater sage-grouse across 11 states, the New England cottontail in the northeast, the Sonoran desert tortoise in Arizona, and the dunes sagebrush lizard in Texas and New Mexico. Candidate Conservation Agreements with Assurances (CCAAs) can also be developed and permitted to provide regulatory assurances to participating landowners in the event that listing is still warranted. Conservation efforts developed by stakeholders may also be rolled into Habitat Conservation Plans that provide predictability and ESA compliance for landowners, industry groups, or local communities if the species is listed.

12. Would you agree that ranchers have been an important and cooperative partner in relation to habitat and species conservation, particularly when we consider the sage grouse?

Response: Yes, we agree that ranchers have been and continue to be an important and cooperative partner in habitat and species conservation, regardless of whether a species is listed or not. Through efforts such as the Natural Resources Conservation Service (NRCS) -led Sage Grouse Initiative, ranchers have restored or conserved millions of acres of key wildlife habitat. The sage grouse, for example, is an integral component of the sagebrush steppe ecosystem, which is the foundation for our Western heritage.

Abundant wildlife is central to the American experience, and protecting our open landscapes and wild places protects both species and the American way of life.

For species under consideration for listing under the ESA, as was the greater sage-grouse, voluntary conservation tools such as Candidate Conservation Agreements with Assurances (CCAAs), Candidate Conservation Agreements (CCAs), and conservation easements are valuable programs to engage ranchers, other private landowners, states, Federal agencies and other conservation partners in projects and actions to conserve species and their habitat before listing. CCAAs and CCAs on over 1.5 million acres of private and public land in Oregon and Wyoming include specific conservation measures that have and will continue to effectively reduce threats to the sage-grouse and its sagebrush habitat. These conservation measures, such as prescribed burning, removing invasive species, and restoration of riparian areas, not only improve habitat for sage-grouse but they also improve rangeland health that is important to rancher's livelihoods. Conservation easements with private landholders, including ranchers, have been used in numerous other situations to conserve listed species, at-risk species, and their habitat, such as with the Dakota skipper in North and South Dakota and Minnesota and the Arctic grayling in Montana.

The Service, through all of its various programs and tools, actively partners with ranchers and other landowners to achieve meaningful conservation. The Partners for Fish and Wildlife (PFW) works with ranchers across the greater sage-grouse range providing both financial and technical assistance for projects that benefit the sagebrush ecosystem and the species that depend upon it. For example, the Keating Valley project in Oregon has treated more than 4,000 acres to control invasive grasses and establish native perennial bunch grass, installed riparian pasture fences to protect brood-rearing habitat in Utah, and in the Central Valley of Montana, implemented a multi-year grazing plan on more than 45,000 acres. In partnership with other Federal agencies, such as the NRCS's Sage-Grouse Initiative, ranchers' efforts are improving rangeland health by controlling invasive species and re-vegetating former rangeland with sagebrush and perennial grasses. NRCS conservation easements for sage-grouse habitat are helping private landowners preserve their property and bestow it to the next generation. These are just some of the many outstanding examples of significant contributions for conservation made by the ranching community from around the country.

13. Increasingly, we are hearing from project developers that ESA Section 7 consultations are being derailed due to a disagreement between FWS and the U.S. Army Corps over the scope of consultation for linear project such as pipelines. Notwithstanding that the Corps has no jurisdiction under the Clean Water Act to impose permit conditions on upland areas, FWS is demanding that the Corps consult on those areas and identifying upland conservation measures for the Corps to impose as special conditions on permits for those projects. The result has been a refusal by both agencies to complete the consultation process, leaving project developers caught in the middle. While we recognize that the ESA requires FWS to consider cumulative impacts during consultation:

- a. Do you agree that Section 7 consultation is intended to identify conservation measures for an agency to incorporate into its proposed activity?

Response: The purpose of consultation under section 7(a)(2) of the ESA is for Federal agencies, “in consultation with and with the assistance of the Secretary,” to insure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of critical habitat. The ESA and its implementing regulations contemplate that the FWS may assist Federal agencies with identifying conservation measures for an agency to incorporate into its proposed activity. For example, the FWS may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat (50 CFR 402.13 (b)).

- b. If so, how does consultation on areas outside of the Corps’ jurisdiction, where the Corps has no authority to impose conservation measures, meet the purposes of Section 7?

Response: When an agency consults with the FWS, the consultation must consider the direct and indirect effects of the federal action (including effects of any interrelated or interdependent actions) in its determination of whether the action is likely to jeopardize the continued existence of the species or destroy or adversely modify designated critical habitat. The analysis of effects addresses all of the effects of the federal action, not just those that fall within the jurisdiction of the federal action agency.

- c. What statutory basis is there to require the Corps to consult over impacts that clearly are outside of its jurisdiction?

Response: Section 7(a)(2) of the ESA requires that Federal agencies, “in consultation with and with the assistance of the Secretary,” ensure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of designated critical habitat. Our interagency regulations governing Section 7 consultations establish that consultations must consider the direct and indirect effects of the federal action on listed species or designated critical habitat, together with the effects of any interrelated or interdependent activities. The analysis of effects addresses all of the effects of the federal action, not just those within the agency’s jurisdiction.

- d. How is FWS going to resolve this issue within the bounds of the ESA, and what is the timetable for addressing this problem?

Response: The FWS and Corps are working together to establish standard operating procedures where the effects of the Corps' actions on listed species and critical habitat extend outside of the Corps' jurisdiction. The FWS and Corps have tentatively agreed on a consultation process for such circumstances, which is consistent with our respective laws, regulations and policies, and expect to cement that agreement early in the new year.

14. The listing of the NLEB has highlighted the difficulties for FWS with listed species with large ranges. FWS Headquarters has allowed each of its field offices to develop its own guidance for the species, resulting in a patchwork of requirements and restrictions among neighboring states. That inconsistency undermines FWS's listing decision and makes reliable project planning impossible.

a. How does FWS intend to resolve this issue?

Response: The FWS has strived to ensure that conservation of the NLEB is being implemented consistently across its range. In support of this, our Northeast, Midwest-Great Lakes, and Southeast Regions, where the NLEB primarily occurs, coordinate with Field Office staff weekly. Staff in FWS regional offices also coordinate regularly, and senior FWS staff (Assistant Regional Directors) meet every two weeks to discuss issues such as consistency. As a result, the FWS has largely addressed this issue.

b. What steps is FWS Headquarters taking to ensure consistency in the ESA consultation process?

Response: Senior FWS headquarters staff meets with appropriate Assistant Regional Directors at least every two weeks to help ensure consistency. In addition, Headquarters staff coordinate with counterparts in regional and field offices on a regular basis to discuss issues such as ensuring consistency.

c. Given that the Service is considering the listing of other species with similarly large ranges in the coming years (Monarch butterfly, rusty-patched bumble bee, little brown bat, tri-colored bat), what steps will the agency take going forward to prevent similar problems?

Response: The FWS learned a number of lessons as a result of the listing of the NLEB. If in the future the FWS lists other species with large ranges that encompass several FWS regions and many states, we will establish coordination and communication protocols based upon the lessons learned from the NLEB listing.

Senator SULLIVAN. Thank you, Director Ashe.

I am going to ask a few questions right now in terms of the proposed rulemaking that you put forward earlier this year which seeks to add clarity and new requirements in the petitioning process. I actually think there are some good ideas in there.

Why did the agency feel it was necessary to take the action? What was the genesis of that? And I would like you to respond more broadly. Former Secretary of the Interior Kempthorne once mentioned kind of famously that the ESA is perhaps the least flexible law Congress has ever enacted. Does the proposed rules relate to that statement by the former Secretary of the Interior?

Mr. ASHE. I will come back to Secretary Kempthorne's statement. I think the reason that we are proposing changes to the petition process is we certainly, in the last decade or so, have seen a surge in the numbers of petitions that we are receiving, including so-called mega-petitions, where we get dozens or even hundreds of species covered by one petition.

So we have endeavored to strategically manage our workload, and so what we are proposing is to put more burden on petitioners. I believe firmly that the petition process is an important ingredient in the fabric of the Endangered Species Act. I also believe that petitioners should, and can, bear a greater burden in terms of providing a factual basis to support their petition, to provide us with more information, to do that not in a context when they are sending us one petition that covers dozens or hundreds of species.

I believe that involving the States at that stage, again, will provide key information to us as we make those initial decisions about whether a petition is warranted.

Senator SULLIVAN. Do you believe you have the statutory authority to make those changes to the petition requirement?

Mr. ASHE. Yes, sir, we believe that we do, and we think that they are well founded, and we put them out for public comment, and we are getting vibrant comment on those proposals. But, again, I think that is key to making the law work better, as you have said. I think we all have a commitment to ensure that we are modernizing the law and we are innovating where we can innovate. And I think our petitioners, people who petition to list species as well as people who petition to delist species, should carry a bigger burden to help.

Senator SULLIVAN. Thank you. I want to ask another question with regard to the States' involvement. As you know, the Endangered Species Act actually mentions the requirement of State consultation. In my experience as a former attorney general, I don't think it happens that well. Do you think there are reforms that we need to undertake statutorily that would either grant States the authority to approve of listings or other kinds of roles, whether it is States, whether it is tribes, whether it is other people in the States that are impacted by ESA listings? And also to be able to utilize the knowledge that States have. As you noted, many of the State agencies have as much knowledge or sometimes more than the Federal Government agencies, and traditional knowledge from tribes and other entities in States.

Mr. ASHE. I think that we can and are taking steps to engage our State partners. I would draw the line. I think decisions have to be made, and these are challenging decisions, and I don't believe

that decisionmaking authority can be ceded or shared with the States.

Senator SULLIVAN. Why is that? Let me give you a hypothetical. What if you are in a State where there is a species that there is a potential designation, and that species does not exist in another State? So one State, one species, one Federal Government. Why couldn't you see the State having the authority to list or have to approve with the Federal Government a listing decision? What would be problematic with that?

Mr. ASHE. States have authorities to list species.

Senator SULLIVAN. I am talking about in conjunction with you under Federal law.

Mr. ASHE. I think that the Endangered Species Act has, at its heart, the commitment to look at the science, and the science only, with respect to the listing of a species, and these are challenging decisions. I think we can gain knowledge from State perspectives, and I think we have shown a commitment to a partnership with States and involving them in these decisions, as we have done with the sage-grouse.

But even with regard to a species in a single State, say manatee in the State of Florida, these are decisions that are about the exercise of Federal authority and they belong, in my view, with a Federal official. That doesn't mean that States cannot and should not add value to that decision; they should and they can, and we can take steps, I think, to enrich that partnership with States. But this is inherently a Federal decision about the exercise of a Federal law and that key decision I think belongs with the Federal Government.

Senator SULLIVAN. Well, just to be clear, it is about Federal authority because Congress granted Federal agencies to make those decisions.

Mr. ASHE. Yes, sir.

Senator SULLIVAN. Congress could also grant States the authority to make those decisions. So it depends on what is in the statute, who has the authority.

Mr. ASHE. Sure.

Senator SULLIVAN. Mr. Chairman.

Senator INHOFE. Thank you, Mr. Chairman.

First of all, let me say I can remember back during confirmation time I was interested in your coming out, really taking a look at this partnership plan that we have done in the State of Oklahoma. You did that. You had actually, I think, a hearing in Edmund and one in Woodward, I think.

Mr. ASHE. Yes.

Senator INHOFE. And I tell you I appreciated that very much.

Now, you mentioned the lesser prairie chicken. You know, we have tried to approach this, along with the greater sage-grouse and all that. In fact, we even had that on the House version of the Senate Armed Services bill, which I think we are going to find is not there any longer. But, nonetheless, it shows the efforts that we go to.

What is interesting is, and I don't say this in a way where I am talking about just the current Administration, but it has always been this problem. You mentioned you may have delisted or down-

graded, I am not sure, you said the largest number, I guess, of any Administration.

Mr. ASHE. Any Administration.

Senator INHOFE. But that is 16 out of 1600, right?

Mr. ASHE. That is correct. I think, Senator, recovery is a long-term endeavor.

Senator INHOFE. OK, that is what I want to get to. Why is it a long-term endeavor? What needs to be done? Because I have a hard time explaining this to people, particularly our five-State plan. That was well put together with five States, and I think you would agree they did a great job, didn't they?

Mr. ASHE. I do agree.

Senator INHOFE. And they came out with recommendations.

Mr. ASHE. And I think what we did to honor that is, to be honest, Senator, without that five-State range-wide plan, our decision on lesser prairie chicken would have likely been endangered. So what we were able to do with a threatened listing is now defer to State-based regulations. So with the lesser prairie chicken, the Fish and Wildlife Service has not written a single biological opinion, has not needed to issue a single permit. The people of Oklahoma and Kansas and Texas and New Mexico and Colorado are working with their State governments to undertake their activities and to achieve conservation for the lesser prairie chicken. So I think we have achieved a success there, even though we had to list it.

Senator INHOFE. OK, now, you had a choice, though, didn't you? You could have either listed it as endangered, as threatened, or maybe a third choice, not listing it at all.

Mr. ASHE. Correct.

Senator INHOFE. Is that right?

Mr. ASHE. That is correct.

Senator INHOFE. All right. And how much was the five-State plan taken into consideration that led you to the conclusion that it should be listed as threatened?

Mr. ASHE. I think that was the dispositive point in that discussion, because we had a State plan that we were confident would achieve conservation, and we have seen great results since that listing determination; population increases, I believe, of up to 25 percent. So I think we are justified in having that confidence in that range-wide plan and, like I said, without that plan the result could likely have been an endangered listing with less flexibility.

And I think that gets back to Mr. Sullivan's point. I have the utmost respect for former Secretary Kempthorne, but I believe the flexibility of the Endangered Species Act is there when you look for it and you work for it, and I think we have shown that, again, during this Administration. We have employed the flexibilities of the law that led us to work with ranchers in the Big Hole of Montana and get to a not-warranted determination for the Arctic grayling. We have worked with timber lot owners in New England to get to a not-warranted determination for the New England cottontail.

Senator INHOFE. OK. No, I understand that, but this is the problem I have. Every time we come up with something, and right now I am talking about the lesser prairie chicken, we go through all this effort to get it done. And let's just say that you agree with it. Not in that case, because it was not listed, so you listed it. But let's

say from this point on it is now listed as threatened. What are the obstacles? Why does it take a lifetime to get this stuff off? Why is it that we can boast of the great job that we have done in delisting some 16 out of 1600? It is kind of hard for me to go back to Oklahoma and talk about that as a success story. What obstacles are out there?

Mr. ASHE. I think the obstacles are pretty clearly resources to do the job. To drive recovery for a species, take grizzly bear, for instance, it was mentioned earlier, it took this country more than two centuries to whittle a bear that once roamed pretty much the entire lower 48, to whittle it down to a few dozen that remained existent in the greater Yellowstone ecosystem. For us then to fight back to recovery has been a 30-year endeavor, but we are on the verge of proposing a delisting for the Yellowstone population of the grizzly bear. But it takes hard work; it takes resources; it takes effort over a sustained period of time.

For species that are habitat limited, we have to reform their habitat. So the red-cockaded woodpecker in the Southeastern United States, we have launched another expansive partnership to rebuild its habitat. It took centuries to eliminate that habitat from the Southeastern United States.

Senator INHOFE. But we are not talking about grizzly bears now, or at least I am not. What about a burrowing beetle? You don't have to recreate habitat for a burrowing beetle. It is certainly not going to take two centuries to do.

My time has expired, but I want to get into this where we can come up with some way to change the law some way that we can actually get rid of some of these so it doesn't take all the resources that you are talking about. That is just my feeling.

Mr. ASHE. Thank you, Senator.

Senator INHOFE. Thank you, Mr. Chairman.

Senator SULLIVAN. Senator Capito.

Senator CAPITO. Thank you, Mr. Chairman.

Thank you, Mr. Director. You haven't mentioned my species yet, but I bet you can guess. It is the northern long-eared bat.

Mr. ASHE. All right.

Senator CAPITO. As you know, it has been listed as threatened, as opposed to being endangered, but it is really causing a lot of issues with a lot of various industries throughout the State of West Virginia. I think some period of time you are not allowed to move forward for 6 months out of an entire year while they are in their mating season, I think. But my understanding, and you and I talked about this, is that the white-nose syndrome, which is a disease, is really what is the predominant threat for this bat, and the problem for us is the sheer size of the habitat for the bat. It stretches from Louisiana to Maine, from Montana to New Jersey. So I guess where are we with this in terms of distinguishing between a disease that is taking a species down and then trying to preserve where maybe nature is taking over? I don't know. What is your response to that?

Mr. ASHE. So thank you for recognizing that. White-nose syndrome is an exotic fungus that was imported to the United States. It is devastating bat populations nationwide, the northern long-eared bat being one that is particularly susceptible to the disease.

There is no doubt that the existence of the species is threatened, at least. So I think our initial determination on that was threatened, and what we did was we provided a special rule, a section 40 rule, which is one of the great flexibilities in the Endangered Species Act. We use that to tailor restrictions in the law.

We published an interim final rule, because we acknowledged at that point that there was probably still more for us to learn, so we have been working during that time period, again, a flexibility in the law to publish an interim final, go out for further comment, which we have done, and we will be here, before the end of the year, coming out with a final rule that will provide additional flexibility.

We agree with you that the long-eared bat is not habitat-limited, so our implementation of protections under the Endangered Species Act should not impose substantial restrictions on the use or development of habitat, because the species is not habitat-limited. But there are key life stages that we need to protect, like hibernacula and, to the extent that we know of their existence, roosting trees. So the species is in great decline. We need to protect, as much as we can, sensitive life stages, but we can do that with minimal restrictions, very minimal.

Senator CAPITO. OK, let me ask you a further question. If an industry is trying to move on and has a habitat, I may not use the correct term, but a habitat preservation plan that comes before Fish and Wildlife, are you under any deadlines of when you have to issue an opinion on whether that habitat plan meets muster? Is it a 60-day limit or is it a 90-day limit, or is it unlimited? Because this is a problem with the response time.

Mr. ASHE. When we do consultations with a Federal agency that might be issuing a permit or providing assistance, we have time limitations.

Senator CAPITO. What are those?

Mr. ASHE. We have 135 days between the time they provide us a completed application to issuance of a final biological opinion.

With regard to a habitat conservation plan which a private party would submit to us, we don't have any particular deadlines to work in with regard to issuance of a permit.

Senator CAPITO. I mean, I think that is problematic, obviously, if you are moving forward with private investment. But I am going to move on because I don't have too much more time.

You have mentioned a couple of times the lack of resources. I would say, and I think I addressed this with you when I spoke with you before in our State, we have very limited Fish and Wildlife resources, and we have a lot of issues in and around the types of industries that are important to us in West Virginia and important to the country. So if you could devote more of those resources to our State, it would be very helpful.

Last, I would like to pay you and Fish and Wildlife a big compliment. As you know, we have the Canaan Valley National Wildlife Refuge. They hosted me there, and I am heavily encouraging you that they do need a new visitor center, so we need to move that up on the list.

Mr. ASHE. All right.

Senator CAPITO. But I would also like to say that Wendy Webber, your regional director who we met with that day, came to visit me there, and I want to give a shout out to your biologist, Dawn Washington, Ron Hollis, who hosted us there on Sunday, my staff, and took us on a bird watching and wildlife tour. And I also would like to compliment you and those in the Canaan Valley. We do have a Kanawha Valley, but this is Canaan Valley, because you have a huge volunteer association, and Casey Rucker has joined me twice to educate me on the Refuge, so I really appreciate that. And it was on a Sunday, too, so thank you very much.

Mr. ASHE. Well, I am sure they enjoyed having you out there, Senator, and thank you for dedicating the time to do that.

And I would say, as we think about this, Mr. Chairman, I think the key for us is field capacity. We are a field organization. When you go around the country, if you and I went to the Blackfoot Valley in Montana and were talking to ranchers like Jim Stone at the Rolling Stone Ranch, he would tell you that our person, Gary Sullivan or Greg Neudecker, are not just good Federal employees, they are good friends to those people. They work with them day in and day out.

When we were working on the sage-grouse, it is a person like Angela Sitts, who is a private lands biologist. Senator Inhofe has always been a good supporter and friend of our Partners for Fish and Wildlife program, where we have people out on the ground who are working with landowners, at the kitchen table, across the tailgate of a pickup truck, across the fence line to work out common sense solutions to problems. So it is those kinds of investments that fuel success with a law like the Endangered Species Act.

Senator SULLIVAN. Senator Barrasso.

Senator BARRASSO. Thank you very much, Mr. Chairman, Thanks for being here to visit with us.

Mr. ASHE. Thank you, Senator.

Senator BARRASSO. I have a couple questions. Today there are more than 1,000 species that are listed as endangered by the Fish and Wildlife Service. Even more are considered threatened. And yet, in the 40-year history of the Endangered Species Act, only 30 species have actually been delisted because they have been recovered. To me, this demonstrates clear failure of a policy that was established to provide for the recovery of imperiled plants and animals.

My question has to do with implementation. The implementation of the Endangered Species Act is notoriously inconsistent. In their 2013 resolution, the Western Governors' Association identified seven key goals that your agency should consider. The first was to require clear, measurable recovery parameters.

In Wyoming, there have been several cases where your agency has changed population requirements multiple times through the listing process. They are moving targets and they compromise our State's ability to engage in meaningful conservation activities, and one example is the grizzly bear. The agency has continued to move the goal post for grizzly bear recovery. Management of the bears, which are recovered, cost the State of Wyoming more than \$1.5 million a year in conflict resolution and damage investigations, landowner compensation.

Isn't it fair to say that if the agency continues to use these moving targets for population, it not only creates a financial burden for the States, but it also fosters a sense of distrust with the agency?

Mr. ASHE. Well, it might not surprise you that we maybe have a little bit of a disagreement about whether there are moving targets, Senator. I certainly think with the grizzly bear we have not. We have an interagency grizzly bear committee which has been a 20-year success story. It involves all of the States and all of the Federal agencies, and they have a technical team and committee that works together to identify the recovery objectives, and we have held to those recovery objectives. We delisted the bear, actually, in 2007 and we, unfortunately, lost in a lawsuit, but we have worked again with our State partners to come back and we are literally on the precipice of another proposal to delist the species. I think we will be successful.

But we have not, in my opinion, changed goal posts. I would say that the law requires us to use best available science, which means in the course of a 20-year recovery plan, can you learn new things? Do you have new science that you have to respond to? The answer is yes. So do we have to change recovery targets? Sometimes, yes, because we have an obligation to use the best available science as we make these decisions and we learn over the course of 10 or 20 or 30 years. But we try to do that in concert with our State and other partners. Can we do better? I suspect we can do better, and I hope you see in us a commitment to do that.

Senator BARRASSO. You testified before this committee in May that Wyoming had met every goal set by Fish and Wildlife, and it was time to delist the gray wolf. There are other recovered species that remain protected under the Endangered Species Act. So the question comes is the management of the gray wolf and other already recovered species have the potential to distract from other more pressing and in the recovery efforts that you need to make elsewhere?

Mr. ASHE. They do do that, Senator, and I think I have been frank with you and others in this discussion. The U.S. Fish and Wildlife Service, which led wolf recovery, it was our people out on the ground who were suffering the slings and arrows of outrage. But we worked through that with our State partners, and Wyoming has been a great partner in wolf recovery and wolves in Wyoming are recovered, and it is one of my greatest disappointments as Director to this point have failed in having that recognized.

But your point is a good one. We have other species that need the protections of the Endangered Species Act, that need the work of the men and women of the U.S. Fish and Wildlife Service and our partners. Wolf is not one of them. We should be working on bull trout or wolverine or greater sage-grouse or other species that can be helped with protection and conservation actions either pre-listing or post-listing under the Endangered Species Act.

Senator BARRASSO. And the final question just kind of follows up, and you partially answered it, in terms of your agency is currently considering more than 600 species for future protection. Many species already listed do not have active recovery plans, so do you feel you have the time and the resources to adequately examine any of

the petitioned species with such a significant backlog of those that you have determined require protection?

Mr. ASHE. We do, Senator, and I think we negotiated a settlement agreement. It was a hard negotiation, and we negotiated the timeline for that settlement agreement knowing the resources that we could expect to receive for our listing program. So the settlement that we negotiated extended the deadlines, the statutory deadlines, so through that settlement we bought more time.

So we matched up the schedule with our priorities, biological priorities and our resource priorities, so I believe we have the resources to do the job in terms of the listing workload that we have now. It is a substantial workload, though, and it is a growing workload.

Senator BARRASSO. Thank you very much.

Thank you, Mr. Chairman.

Senator SULLIVAN. Director Ashe, I just want to conclude with two other quick questions.

First, we are obviously very focused on the species and protecting them, but we are also focused on the livelihood of our constituents, on jobs, on a strong economy. I hear from Alaskans sometimes, hey, there is so much focus on the Endangered Species Act, what about the endangered jobs act? What about making sure we take care of employment?

How do you balance that call in terms of the listing of species and the impact it has on jobs and the economy? And is there more needed to be done in the statute to make sure that the Federal agencies are doing the proper balance?

Mr. ASHE. I think, as I have said, we have substantial flexibility, and I think we have been innovating during this Administration and exploring where we can find further flexibility in the law. I believe that the basic question of whether a species should be listed is a diagnosis. It is either endangered or it is threatened or it is not, and that is a kind of fundamental precept in the law, that science-based determination. After that, when we designate critical habitat, we can take into consideration national security; we can take into consideration economic impacts or social impacts. When we do a consultation with a Federal agency, if we find jeopardy, the thing we recommend is something called a reasonable and prudent alternative. So we work with the Federal agency within their statutory authority to do the best they can to conserve a species.

So I think the law has flexibility. Certainly, Congress could explore whether additional flexibility would be advisable, but I think on that initial threshold decision it should be a science-based determination.

Senator SULLIVAN. OK, let me conclude with one final question regarding climate listings. As you probably know, in the last few years, Fish and Wildlife Service NMFS have listed or designated habitat for species, the polar bear, the bearded seal, the ring seal in Alaska not based on a decline in the population, a species decline, but, rather, a perceived future decline as a result of climate change and climate change modeling that you are predicting there will be a decline. And, as you can imagine, when you live in an Arctic State like Alaska and you are making listing decisions based on future modeling of climate change when the species themselves

physically are actually strong right now, there seems like there is no limit to the number of species that you could list in an Arctic State like ours.

So what is the limit and where do you derive your authority to make listings based on future predictions in computer models, not based on actual physical declines of species that are presently occurring?

Mr. ASHE. Thank you, Mr. Chairman. Before I answer that, I do want to say I am going to have two Governors come up in the panel after me, and they are beginning an effort within the context of the Western Governors' Association to explore additional administrative and potential legislative improvements to the Endangered Species Act, and we in the Fish and Wildlife Service have pledged our support and partnership in doing that. The reason I bring that up is because that is a question that Governor Mead asked me earlier in the day.

I think that with regard to a species, sometimes we are certainly conflicted if we wait until a species is on the verge of extinction.

Senator SULLIVAN. No, but I didn't say that.

Mr. ASHE. We have limited flexibility. So if we want maximum flexibility, then we have to look into the foreseeable future, which the law asks us to do, tells us to do; that we have to make a determination whether a species is facing an imminent threat, that is, endangered, or whether they are likely to become endangered in the foreseeable future. That would be threatened. So the law asks us to look into the future. The best way we can do that is by the use of models.

With regard to species that are principally affected by climate, it is actually a pretty narrow range of species. All species will be affected to some degree by a changing climate, but species for which climate change is the principle threat, like polar bear or ring seal, there are relatively few of those. And if you look at how the Fish and Wildlife Service has made determinations, we were petitioned on polar bear, which we listed as threatened, foreseeable future. We were petitioned on the pika, a small rabbit that occupies high alpine in the Western U.S., and we found that not warranted. We were petitioned on wolverine and we found that not warranted.

Senator SULLIVAN. But do you see the concern is that if there is a population that is not in decline, that is even increasing, the polar bear population had, over the last several decades, increased pretty dramatically, and yet we have a listing based on a computer modeling of what might happen in the future, particularly if you live in a State like mine, the species you just mentioned are all in Alaska, it seems like it is a limitless amount of discretion that you have. You are not basing it on an actual decline. You could have a healthy population, which the ring seal, I think most people would agree is a healthy population, but you are listing it anyways based on future modeling, which by its very nature is speculative. I think it just seems like a limitless approach to doing this. And if you live in a State that is an Arctic State, there could be no end in sight to the number of petitions and listings based on this kind of precedent.

Mr. ASHE. I don't agree with you, a limitless. Speculation is one word. As a scientist, a model is a predictive tool; it helps you pre-

dict an outcome. It is not perfect, but it is the best we can do. Say our decision on polar bear, the modeling that we applied was very conservative modeling about projecting what was going to happen to the sea ice habitat of the polar bear, and the Beaufort Sea population of the polar bear is in pretty significant decline, and we know that that is correlated to the loss of their sea ice habitat. And since we made our listing decision back in 2008, at every juncture as we have looked at new information about the rate of sea ice loss, it is worse than we thought it was going to be.

So when you apply models, you analyze the uncertainty related to those models. It is not speculation, it is the application of science. That is how we have 5-day and 10-day weather forecasts, is we are applying a model to the future, and it certainly is not perfect, but we all rely on it in planning our day-to-day activities. So modeling is very valuable and invaluable tool as we think about analyzing complex situations.

But I agree with you it is a challenge, but I think, again, in the Fish and Wildlife Service we have done that evenhandedly. In the case of the pika, even though that species is being affected by climate change, it is unequivocal that is being, we found that there would be populations that remained stable and secure into the foreseeable future.

Senator SULLIVAN. Well, I am going to turn to the next panel here, but there are a lot of issues here with regard to what is the foreseeable future, how you define that, and, again, the discretion that seems it can lead to kind of a limitless number of possibilities if you have strengthened populations. We are very proud of our strong populations, huge populations of species in Alaska, but if it is based on not an actual decline or any indications of an actual decline, but future modeling, it just seems that almost any species is available for listing. And as you are seeing through the petition process from certain groups, they are essentially trying to do that, certainly in my State, list almost everything, and it is a little troubling and concerning, but it is something we can work on.

Mr. ASHE. Well, thank you, Senator.

Senator INHOFE. I only have one question.

It disturbed me a little bit when Senator Sullivan was talking about what you are doing now anticipating climate change and all of this. Who establishes the criteria for these assumptions in the future that you are preparing for? Who does that?

Mr. ASHE. We rely on the best science available, so in the case of the polar bear—

Senator INHOFE. Well, no, when you are talking about what is going to happen in the future to climate, where the climate is going to change.

Mr. ASHE. We rely on NASA, NOAA.

Senator INHOFE. IPCC?

Mr. ASHE. The IPCC report provides important information, but mainly, because this was an issue about sea ice, we relied on NOAA and NASA experts.

Senator INHOFE. What I am saying is you can use what you consider to be the best science available. I might not agree with you that that is the best science available.

Mr. ASHE. You might not.

Senator INHOFE. So I assume that we will just have to wait for another Administration, then, before we can get this done.

One last thing. Senator Barrasso brought up something that I had already been talking about, and that is if you are looking at 1600 listings out there and you consider it to be successful that you have been able to take off the list 16 out of 1600, I don't think that is very successful, and I think your answer was it is a process that takes time, it takes a lot of resources to get done.

My question is that can be changed. That can be changed legislatively, and I think maybe we should be looking at that. If it takes that long so successfully come up with 16 off the list of 1600, I think it is time for a change. And that is my job, not yours.

Senator SULLIVAN. Director Ashe, thank you very much. We do want to work with you on looking at ways to move forward on smart reforms for the Endangered Species Act. Thank you for your testimony.

I want to welcome our second panel of witnesses: Hon. Matt Mead, Governor of Wyoming, and Hon. Steve Bullock, Governor of Montana.

Senator BARRASSO. Thank you very much, Mr. Chairman. I am pleased to introduce Governor Matt Mead, the thirty-second Governor of Wyoming. Governor Mead was first elected in 2010, re-elected for a second term in 2014, raised on his family ranch in Teton County, a law degree from the University of Wyoming. He has served as county and Federal prosecutor, practiced privately in law and served the United States attorney for Wyoming as U.S. attorney from October 2001 to June 2007. He also serves in regional and national leadership roles, including currently being chairman of the Western Governors' Association, and serves on the Council of Governors and is vice chairman of the Natural Resources Committee of the National Governors Association.

So I am very pleased to welcome Governor Mead here today to share his remarks on the Endangered Species Act.

Welcome, Governor Mead.

Senator SULLIVAN. Governor, you have 5 minutes to deliver your opening statement. Governor Mead.

STATEMENT OF MATT MEAD, GOVERNOR, STATE OF WYOMING, CHAIRMAN, WESTERN GOVERNORS' ASSOCIATION

Mr. MEAD. Thank you, Governor Bullock, for turning on my mic.

Mr. Chairman, thank you very much. It is a privilege to be here and a privilege to be introduced by our two fine Senators from Wyoming.

Thank you, Senator Barrasso and Senator Enzi. It is a privilege.

We have several Western Governors here, and we have meetings for the next couple of days, so it is a pleasure to be with Governor Bullock from Montana. He is not only a fellow Governor; he is a friend, and he is also Vice Chairman of the Western Governors' Association.

We are honored to be here, and we look forward to your questions. I am going to try to keep my comments relatively brief so we have as much time for questions as possible.

I am Governor of the State of Wyoming, and at the end of June, I was elected chairman of the Western Governors' Association,

which represents Governors of 19 Western States and 3 U.S. flag islands. I will serve chairman for 1 year. Governor Bullock serves as vice chairman and then will take over as chairman. In addition to our comments today, we have provided written remarks on behalf of Western Governors as a group, and we hope you will consider those as well.

As you all know, the West is a vast, varied place, and each Western State has its own specific concerns and viewpoints. Yet, Western States share challenges, goals, and opportunities regarding natural resources, for example, in the area of water, wildlife, forests, and energy development. Western Governors, through the WGA, seek areas where we have issues in common, where we can reach consensus to find solutions, act cooperatively, and benefit all our States.

Each chairman has an opportunity to designate an initiative, an area of focus during the Governor's tenure as chairman. Recent initiatives prior to mine have included drought and getting outdoors in the West. My initiative is the Endangered Species Act, and is aimed at reforming and improving the Endangered Species Act.

Just a couple of numbers that we have, and you all have mentioned some as well. Currently, the information we have is listed as threatened or endangered species in the U.S. is 1,567. Outside the U.S., 653, for a total of 2,220. Since 1973, the total species delisted is 59. Species delisted due to extinction, 10. Species delisted due to error in original data, 19. Species delisted due to recovery, 30. So of the 59, 10 went extinct, 19 were removed because of a mistake, 30 have been delisted because they have been recovered. So totally delisted for any reason as a percent is 2.56 percent. Total delisted due to recovery as a percent, 1.3 percent.

When we have worked on issues such as grizzly bears or wolves in Wyoming, we see the challenges. And the reason I wanted to choose the Endangered Species Act as an initiative is that, as I view it, from my experience growing up in Wyoming and as Governor of Wyoming, the Endangered Species Act, as it is today, is not working. I think it is broken. There have been some tremendous successes, no doubt about it, but let me just give you a first-hand example.

When I came into office, the State of Wyoming had worked years on trying to get the wolves delisted. So I sat down with then-Secretary Salazar and Director Ashe. Our offices worked long and hard, and had face-to-face meetings with one another, sometimes just two or three of us in the room. Sometimes it was just me and the secretary; sometimes it was just me and Director Ashe. And building on a broad coalition with ag groups, with industrial groups, with sportsmen, we came up with a plan that we thought would work for Wyoming and make sure there was a healthy wolf population. We all agreed upon this. We went forward. We had a hunting season. And during that time that we had the wolves delisted, not only was our plan a success; in fact, we showed that the wolves were becoming even stronger.

So sometime after the fact we get challenged, it goes to court, and a judge in D.C. says, yes, the wolf is recovered, but too bad. And this is what leads to this question of certainty. How do we get to certainty? How do we get to the finish line?

In Wyoming, there is no question, as in across the West, we value our wildlife. It provides a quality of life. That is why many of live in the West. But we also value jobs. We also value careers for our kids and our grandkids. And when the Endangered Species Act creates these uncertainties, we get the same questions that Senator Inhofe gets asked and you get asked, Senator Sullivan: What about the jobs? How do we keep people working? How do we keep food on the table? So we do need some certainty.

And then when you throw in things like modeling climate change, I am not an expert in this field, but I will tell you that the ranchers in Wyoming ask me, you know, when they can tell me when it is going to rain and when I am going to hay, then I will start listening what is going to happen 10 or 20 years beyond that on the climate.

These are practical questions that people ask, and we are required to answer those questions. But when you combine modeling with the foreseeable future, which is also undefined, the Western Governors have asked for some clarification and definition on those things to try to find a way forward.

So, in my view, the ESA is broken, and since 1973, when you have just about 1 percent recovered, that, I do not think is a success. It leads to economic burdens that impact our States, our citizens, and our businesses.

The grizzly bear has been mentioned, that is another example, because as soon as we had wolves delisted for that short period of time, I wrote Secretary Salazar in, I think it was, 2012 and I said, next we need to get the grizzly bears delisted.

Senator Inhofe, you asked the question about why does it take so long. Well, I understand the answer that it may take 20 or 30 years for species recovery, or 50 years, but once it is recovered the question is why does it take so long after they are recovered to get them off the list. When everybody agrees, including the secretary, including the director, that it is recovered, why can't we move forward more quickly? Because nobody says we don't want to care about the species, but once they are recovered, let's get them off the list not only for the certainty it provides industry but, in fact, to do a better job for other species. When we are wasting time, money, and effort, when we are spending \$2 million-plus just in Wyoming taking care of grizzly bears, what species are we not taking care of?

So last week was a good example of success. The U.S. Fish and Wildlife Service decided not to list the greater sage-grouse. This shows success on a number of levels, the cooperation that we had with the secretary's office, the director's office, with BLM, Forest Service, with States across the West. It was a tremendous effort, and we should all be proud of that. But I would say to you, Mr. Chairman, that wasn't because of the Act; it was because of the efforts beyond the Act, at the local level, county commissioners, city council, our State legislators, those people in the Federal Government who went beyond the Act, the people in the State, starting with my predecessor, Governor Freudenthal, who went beyond the Act that created the plan. That was not due to the Act; it was due to the great relationships.

We need more certainty than that, because those relationships may not always be there. We hope that that is a model how to go forward in the future, but it would be very nice to have some statutory sideboards to make sure we can reach those goals, because everybody rightfully asks the question: When do we get to the finish line? How do we get there? We are willing to do it if we know there is a finish line and we can have this certainty.

So my initiative will be a bipartisan regional conversation. Governors are particularly well suited to exert leadership in this area, given State obligations to manage wildlife and Western States' outstanding conservation record. We care about wildlife in the West. We, the States, manage it well and we need a system that works. We stand ready, Mr. Chairman, to work with the committee and Congress, with Federal agencies and others to reform and improve the ESA. It is time to do this not only for our citizens; it is time to do this for species.

Thank you, sir.

[The prepared statement of Mr. Mead follows:]

Remarks of Matthew H. Mead, Governor of Wyoming
Before the
United States Senate
Committee on Environment and Public Works
Subcommittee on Fisheries, Water, and Wildlife

Endangered Species Act Reform

Chairman Sullivan, Ranking Member Whitehouse, and Members of the United States Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water and Wildlife, my friend and fellow governor, Governor Steve Bullock and I thank you for the opportunity to give remarks. We are honored to be here. We are happy to answer questions you may have.

I am Governor of the State of Wyoming. I was re-elected in November 2014 and am now serving my second term.

At the end of June, I was elected Chairman of the Western Governors' Association (WGA), which represents governors of 19 western states and 3 US-flag islands. I will serve as Chairman for one year. Governor Bullock serves as WGA Vice Chairman. The WGA has provided written remarks today on behalf of Western Governors as a group and these remarks are ancillary to that submission.

The West is a vast, varied place and each western state has its own specific concerns and viewpoints. Yet western states share challenges, goals, and opportunities regarding natural resources – for example, in the areas of water, wildlife, forests and energy development. Western Governors, through the WGA, seek areas of commonality where we can reach consensus to find solutions, act cooperatively, and benefit all our states. The WGA is a dynamic organization.

Each incoming WGA Chairman designates an initiative – an area of focus during that governor's tenure as Chairman. Recent initiatives, prior to mine, have included drought and getting outdoors in the West. My initiative is the Endangered Species Act (ESA), and it is aimed at reforming and improving the ESA. There is much room for improvement and in the coming year, after the WGA has studied the ESA and received public input, Western Governors will be able to make recommendations to improve it.

By any measure, the ESA is broken. Since 1973, less than one percent of the 2,280 species listed has been removed from the list. Either listing has not led to recovery or recovered species have been kept on the list.

The gray wolf is an example of a recovered species that remains on the endangered species list, diverts valuable resources from other wildlife work and causes unnecessary

economic burdens that impact states, citizens and businesses. The grizzly bear is another example of a recovered species that remains on the list.

Last week the U.S. Fish and Wildlife Service decided not to list the Greater sage-grouse. This shows a success and reflects a bright future for the Greater sage-grouse in Wyoming and in the West. Wyoming had been a leader in the conservation effort over the past decade. The goal is not listing although listing upon listing does seem to be the goal of some environmental groups.

My Chairman's initiative is designed to foster a regional dialogue in which states, federal agencies, and interested others can share case studies and best practices in species conservation. The initiative will involve an examination of the ESA to determine what is working and what is not working. It will consider means by which states resources – including state data, science, analyses and manpower – can be better leveraged for species conservation.

The initiative will be a bipartisan regional conversation. Governors are particularly well-suited to exert leadership in this area, given state obligations to manage wildlife and western states' outstanding conservation record. We care about wildlife in the West, manage it well, and need a system that works.

We stand ready to work with the Committee and Congress, with federal agencies and others to reform and improve the ESA. Thank you again for your time today.

Remarks of the Western Governors' Association

**Before the
United States Senate
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works**

**Briefing on Improving the Endangered Species Act:
Perspectives from the Fish and Wildlife Service and State Governors**

September 29, 2015

Chairman Sullivan, Ranking Member Whitehouse and Members of the Subcommittee, Western Governors appreciate the opportunity to present remarks today on the issue of species conservation and the Endangered Species Act (ESA). These remarks are presented by the Western Governors' Association (WGA). WGA is an independent, non-partisan organization representing the Governors of 19 western states and three United States-flag islands.

Background

Western Governors recognize that large intact and functioning ecosystems, healthy fish and wildlife populations, and abundant public access to natural landscapes are significant contributing factors to the West's economy and quality of life. Wildlife-associated recreation — including hunting, fishing, and wildlife watching — generates over \$65 billion annually in the 19 western states represented by WGA.

We value the contribution of the ESA in promoting wildlife conservation. The Act has done much to focus attention on distressed species and to promote the conservation of wildlife habitat. Western Governors believe there is much to learn from both the successes and the failures of the Act.

Western states are particularly and uniquely affected by the ESA. Listing decisions have real economic effects on state and local governments through restrictions on rangeland grazing, hunting, tourism and development of resources on public and private lands. The regulatory processes associated with evaluation of species for listing under the Act are time-consuming, complicated and litigation-prone. These factors often affect western states' abilities to maintain infrastructure and provide for natural resource and economic development.

Implementation of the ESA, and species conservation efforts generally, require a strong state-federal partnership. States work cooperatively with federal agencies on species and habitat issues throughout the West. Through decades of work on wildlife and conservation, states have developed extensive expertise related to – and knowledge of – species within their borders. In many cases, state wildlife agencies often have the best available science on species and retain primary jurisdiction over most wildlife on federal, state and private lands.

Western Governors’ Association Policy

As you consider possible improvements to the Act, we would draw your attention to several policy resolutions Western Governors have adopted relating to species conservation. We hope the principles that Western Governors have wrestled with and reached agreement on will serve as a solid foundation for your own deliberations. Following these remarks, you will find three relevant resolutions adopted by WGA:

- Policy Resolution 2013-08: *Endangered Species Act*
- Policy Resolution 2014-11: *Species of Concern and Candidate Species*
- Policy Resolution 2014-14: *State Wildlife Science, Data and Analysis*

We would highlight Policy Resolution 2013-08: *Endangered Species Act*. In this resolution Western Governors suggest seven broad goals as a basis for any bipartisan reform of the ESA. These goals should be achieved while maintaining the Act’s integrity and original intent to protect listed species. Implementation of these goals will improve the effectiveness of the Act by making it more workable and understandable.

WGA would also like to highlight the efforts Western Governors have made to promote positive administrative changes to the ESA regulatory process. Western Governors have provided comments on several recent proposed rulemakings, and following these remarks we have provided copies of our comments on a few of these proposals for your consideration:

- ESA Petitions Rulemaking
- Policy Regarding Voluntary Prelisting Conservation Actions
- Proposed Changes to Critical Habitat Designation (encompassing two proposed rules and one draft policy)

Western Governors have been heartened to see that state considerations have been reflected in federal agency rulemaking and policies. We also recognize that there is a limit to operating solely in the administrative arena. Regulations are not statutes, and do not provide the certainty and consistency that statutory changes would produce.

Conclusion

Western Governors appreciate this opportunity to discuss species conservation, the role of the states in this important endeavor, and the impact the ESA has on state conservation efforts. Having worked diligently for many years, and on a bipartisan basis, on species conservation initiatives, Western Governors believe a consensus approach to reauthorization that promotes broad bipartisan support and maintains the intent of the Act are necessary. We hope this discussion will help you develop a blueprint for changes to the Act that would improve its operation and its outcomes for distressed species. Thank you for this opportunity to provide our thoughts.



**Western Governors' Association
Policy Resolution 13-08**

Endangered Species Act

A. BACKGROUND

1. Western Governors applaud the principles of the Endangered Species Act (ESA). Since its enactment in 1973, the ESA has helped prevent the extinction and assisted the recovery of some threatened and endangered species, while providing ancillary benefits to other sensitive species.
2. States possess broad trustee, police powers and primacy over fish, wildlife and water within their borders.
3. Through decades of work by employees and contractors, States have developed extensive expertise related to – and knowledge of – species within their borders.
4. Western states are particularly and uniquely affected by the ESA. Natural resource development, economic development, and maintenance of existing infrastructure in the West sometimes impact species and their habitats. Consultations associated with threatened and endangered species often impact western states' abilities to maintain infrastructure and provide for natural resource and economic development.
5. Given the impact ESA listing decisions have on vital state interests, states should be full and equal partners in administering and implementing the ESA. Federal agencies should work with states in a meaningful and productive manner on all ESA matters potentially impacting the states, as defined in Section 6(a) of the ESA: "In carrying out the program authorized by the Act, the Secretary shall cooperate to the maximum extent practicable with the States."
6. The ESA is premised on a strong federal-state partnership. But the Act and its implementation need to provide expanded, meaningful opportunities for states to comment, participate, or take the lead before the federal government makes any number of decisions under the ESA. Such participation is largely optional under the current scheme and has been provided inconsistently. The role of states also has been limited by rigid internal federal processes, interagency jurisdictional disputes, and interpretations of the provisions of the Federal Advisory Committee Act (FACA). This scenario has prevented the sharing of scientific information and the consideration of state determined, science-based information.
7. Western Governors recognize that species and habitat protection can be enhanced through appropriate changes in the Act. However, determining the shape of those

changes has proven to be controversial and Congress has been unable to reauthorize the ESA since its spending authority expired in 1992. Key areas that need to be addressed in the ESA include:

- a. defining a clear methodology and practice for de-listing recovered species;
 - b. establishing a comprehensive system of incentives to encourage state and local governments to develop water, land-use and development plans that balance habitat conservation and environmental concerns with necessary development and economic growth;
 - c. providing adequate tools and incentives that encourage private landowners to engage in species and habitat conservation activities;¹
 - d. increasing grants authorized under ESA Section 6 – and other federal funding for the recovery of listed species – for: 1) state and local implementation of the Act; and 2) federal efforts to prevent additional listings in active partnership with the states; and
 - e. addressing the pressure on states to expend scarce funds to address, mitigate and recover endangered and threatened species, at the expense of non-listed species within the state’s jurisdiction.
8. Climate change is increasingly being used as a determinant factor in the assessment of the need to list a species under the Act. The meaning of “foreseeable future” with the use of climate modeling is still undefined for effective management decisions related to implementation of the ESA. Predictions from climate models grow increasingly uncertain over time. Additionally, the Service currently has no criteria to weigh the model uncertainty related to projected scientific information, such as climate change, in their scientific review.
 9. States are concerned about the use of the precautionary principle in various recent listing regulations and recovery planning processes, both proposed and adopted. This principle, coupled with the use of studies based upon modeling (rather than observational science, such as accurate species population counts), has the effect of removing species from state jurisdiction and extending critical habitat into areas requiring extensive ground-truthing. In some instances, such listed species are at a

¹ The USFWS and NMFS has gathered information on this via a State-Federal ESA Joint Task Force and has published a Federal Register Notice on the issue, and now has a team working on development of incentives. We encourage the completion of this effort with an output of meaningful incentives.

healthy population level and are expected to remain healthy for decades into the future. Listings based on climate change modeling makes it difficult for the federal government and the states to identify a recovery timeline or plan for management of the listed species.

10. States are capable of managing species, including those that might be impacted by future conditions. States should be viewed as full partners in all ESA decisions, but particularly when reviewing and considering the challenges that could be faced by species in the future. States bring a wealth of observational knowledge and information about the current status of a species and its habitat that must be factored into any ESA analysis or decision, including listing a species or determining range, based on the precautionary principle and best professional judgment. Federal consultation with states in analyses and final decision making will result in more durable and implementable solutions, and allow for strained federal budgets and resources to be allocated to protecting and conserving species at serious risk of extinction.
11. Federal agencies have also administratively expanded the definition of “critical habitat” beyond the “specific areas ... essential to the conservation of the species” (*ESA, Section 3(5)(A)*) to those areas determined to represent areas which could, in theory, become habitat, but are not currently capable of supporting conservation of the species. Because the designation of “critical habitat” federalizes state, county, municipal, and private lands, such a broad application adds unnecessary and uncompensated regulatory burdens and costs.
12. The ESA requires that the “best available” biological information be used by the federal government in making determinations about individual species’ status for the purposes of the ESA. Biological information should be collected as thoroughly as possible in the timeframe provided by the Act, and should include scientific information and biological opinions from affected states.
13. The negative economic impacts of federal ESA decisions fall solely on states, local communities, businesses, jobs, and private property owners.

B. GOVERNORS’ POLICY STATEMENT

1. After working through their own strongly-held differences in how the Act should be renewed, Western Governors believe that the ESA can only be reauthorized through legislation developed in a consensus fashion that results in broad bipartisan support and maintains the intent of the Act.
2. Western Governors call on Congress to amend and reauthorize the Endangered Species Act of 1973 based upon seven broad goals. These goals should be achieved while maintaining the Act’s integrity and original intent to protect listed species.

Implementation of these goals will improve the effectiveness of the Act by making it more workable and understandable. The seven goals are:

- **Require recovery goals for listed species.** Western Governors believe that recovery, and ultimately de-listing of species covered by the ESA, should be the highest priority of the Act. Every effort should be made to complete a recovery plan within one year of a species being listed, when doing so will not compromise the integrity of the plan. Federal funding for ESA activities should be prioritized to achieve species recovery. Western Governors believe that the best way to accomplish this goal is to require the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration (“NOAA-Fisheries”) to publish quantifiable recovery goals, in consultation with the affected state(s), for threatened or endangered species at the time of the listing decision. This will provide objective recovery criteria that both state and federal agencies may work toward in the recovery process. In cases where quantification of recovery goals is not initially feasible, the services should be required to publish a plan, including a timeline, describing the steps the federal agencies will take in identifying measurable goals. Further, the Western Governors believe the required objective recovery criteria should include a clear articulation of the required population, population trends, or other relevant criteria.
- **Significant portion of the range must be defined.** Listing and delisting decisions under the ESA are inextricably linked to a species’ endangered or threatened status “throughout all or a significant portion of its range.” The ESA does not define the phrase and current interpretations apply the Act’s listing and delisting criteria on a range-wide basis, regardless of a species’ healthy status through proactive conservation efforts in a particular state. The success of the ESA in conserving endangered and threatened species largely depends on state participation. “Significant portion of the range” should be defined to incentivize and reward state conservation efforts by listing species only in states or areas where they are actually imperiled and conversely, delisting them where recovered. The incentive for proactive conservation efforts by states is significantly undermined by listing and delisting decisions that fail to recognize such efforts.
- **Enhance the role of state governments in recovering species.** The Endangered Species Act can effectively be implemented only through a full partnership between the states, federal government, local governments and private landowners. One way to accomplish this partnership is to authorize the delegation of authority for the development of conservation plans on a voluntary basis to states that choose to accept such delegation, and agree with the appropriate Secretary(s) to perform them in accordance with specified standards. Authority should also be given to the appropriate Secretary to provide grants for

the additional administrative costs to the state. States will benefit by a right of refusal to be full partners in recovery planning and species management. Additionally, states should also be offered tools such as incidental take authority, as authorized by the ESA.

- **Ensure the use of sound science in ESA decisions.** Given the broad implications that may arise when ESA actions are taken, significant decisions must be made using objective, peer-reviewed scientific literature and scientific observations. A review of the scientific and management provisions contained within listing, recovery and de-listing decisions by acknowledged independent experts is important to ensure the public that decisions are well-reasoned and scientifically based. State agencies often have the best available science, expertise and other scientific and institutional resources such as mapping capabilities, biological inventories, biological management goals, state wildlife action plans and other important data. This wealth of resources is highly valuable; the federal government should recognize, consult, and employ these vast resources in developing endangered species listing, recovery and delisting decisions. Scientific and management review committees, as well as the scope and extent of the appropriate scientific and management review, should be agreed upon by the U.S. Fish and Wildlife Service, NOAA-Fisheries and the affected states. Federal agencies may delegate their responsibility to name these review committees, and determine the scope of review to states in order to enhance state ownership of the committee's decision.
- **Incentives and funding for conservation are essential.** Western Governors believe that providing economic incentives for landowners to participate in conservation efforts is likely to achieve more efficient and cost-effective results, and may lead to more rapid conservation. In addition, funding for ESA related activities should be enhanced to address the growing list of threatened and endangered species. Funding needs to escalate rapidly as state and federal agencies increasingly assume ESA management activities and embrace ecosystem management strategies. The Cooperative Endangered Species Conservation Fund authorized under Section 6 should be funded and managed as a block grant, with state discretion on spending priorities. A broad range of programs, from the Farm Bill to the Water Resources Development Act, should be reviewed for opportunities to assist communities and landholders in their efforts to conserve species in a manner that respects water and property rights. Funding needs to be made available for proactive and incentive-based efforts to prevent listings, and for recovery plans and de-listing activities.
- **Foreseeable future must be defined.** The ESA does not contain a clear definition of foreseeable future. As a result, there is considerable variation in the Service's interpretation of this factor in listing, recovery planning, and delisting decisions.

This lack of clarity is becoming a critical point for divergent and unfocused decisions as the scientific effects of climate change are being incorporated into these decisions. The re-authorization of the Act needs to provide further definitions for this term.

- **States should be full partners in listing and recovery planning decisions, particularly when modeling is used in analysis.** When federal agencies intend to rely on the precautionary principle or best professional judgment, particularly when coupled with the use of long-term modeling and forecasting, in place of current observational science and measurable impacts, the states should be a full partner in the analyses, model development and consulted with prior to final decisions. In these circumstances, federal agencies should partner with states to develop and utilize mutually acceptable predictive techniques and consensus-based metrics that maintain state primacy in the management of the species and are strongly grounded in observational science and measurable outcomes.
3. Western Governors encourage the federal government to consider sound science, particularly from state agencies, and to include such science in its species status assessments and listing decisions.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Governors direct the WGA staff, where appropriate, to work with Congressional committees of jurisdiction and the Executive Branch to achieve the objectives of this resolution.
2. Furthermore, the Governors direct WGA staff to develop, as appropriate and timely, detailed annual work plans to advance the policy positions and goals contained in this resolution. Those work plans shall be presented to, and approved by, Western Governors prior to implementation. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual work plans.



**Western Governors' Association
Policy Resolution 2014-11**

Species of Concern and Candidate Species

A. BACKGROUND

1. States possess broad trustee responsibilities, police powers and primacy over management of the majority of fish and wildlife within their borders, and state wildlife managers have on-the-ground expertise in managing species.
2. Western states are proactively engaged in species conservation, including development of state and/or multi-state conservation plans to manage species as an alternative to federal Endangered Species Act (ESA) regulation.
 - a. All 11 states with greater sage-grouse have developed state conservation plans or other authorities for conservation.
 - b. The five states with lesser prairie-chicken collaborated with the Western Association of Fish and Wildlife Agencies to develop the Lesser Prairie-Chicken Range-wide Conservation Plan. The Plan was endorsed by the U.S. Fish and Wildlife Service (FWS).
3. Western Governors applaud federal incentive-based conservation efforts such as the Sage-Grouse Initiative (SGI) and the Lesser Prairie-Chicken Initiative of the Natural Resources Conservation Service. These initiatives have successfully assisted landowners in conserving habitat for those species on a voluntary basis. ESA listings dramatically alter the ability of states and federal agencies to seek incentive-based, collaborative solutions to difficult conservation questions by causing citizens to avoid cooperative agreements.
4. ESA listing decisions have real economic impacts for state and local governments through restriction on rangeland grazing, hunting, tourism and development of resources on public and private lands. The negative economic impacts of federal ESA decisions fall solely on states, local communities, businesses, jobs, and private property owners.

B. GOVERNORS' POLICY STATEMENT

1. Western Governors support all reasonable management efforts to conserve species and preclude the need to list species under the ESA.

2. Western Governors believe that state and multi-state conservation plans, upon review, consultation and endorsement by the U.S. Fish and Wildlife Service or National Marine Fisheries Service (NMFS), should give rise to a regulatory presumption by federal agencies that an ESA listing is not warranted. To that end:
 - a. States need clear, concrete guidance from FWS and NMFS about the requirements of state and multi-state conservation plans in meeting minimum conservation goals and objectives that would lead to stable or increasing populations, eliminate perceived threats to the species, and eliminate the need for listing.
 - b. FWS and NMFS should acknowledge that variability in state approaches for conservation of species, particularly for species with a wide geographic range such as the greater sage-grouse, can be valid so long as conservation goals and objectives are met.
3. States should be included as partners in ESA listing determinations, particularly in the case of listings that could have significant impact on state economies. Partnerships must include:
 - a. Cooperative engagement of federal agencies with state fish and wildlife agencies to ensure that state fish and wildlife data, analyses and management recommendations are used as a principal source to inform listing determinations.
 - b. Avoiding duplicate analysis by federal agencies of raw data previously prepared by the states.
 - c. Giving full consideration to state conservation plans as a means for species management and using such plans to the greatest extent practicable.
 - d. Private landowners are central to voluntary conservation efforts. Concerns about public release of data make private landowners reluctant to engage in these valuable voluntary conservation efforts. Efforts should be made to publicly release data at an appropriate scale which acknowledges and addresses such concerns.
4. In considering whether to list a species under the ESA, the FWS should give full recognition to voluntary conservation efforts conducted by landowners, states, non-profit organizations, and other stakeholders, whether independently conducted or in partnership with federal programs like the Sage Grouse Initiative (SGI).
5. When issuing a proposed rule for a candidate species, the FWS should define what thresholds of geographic, temporal or other conditions are necessary to preclude the need to list a species.

6. Conservation efforts by both federal and state governments should prioritize time and funding for primary challenges facing a particular species, rather than less-significant concerns or those easiest to mitigate.
7. Federal agencies, as partners, should do their share to conserve species and be consistent and coordinated in their efforts to conserve species.
 - a. Federal agencies need to demonstrate their commitment to species conservation by prioritizing such efforts on their own lands, in cooperation with the overarching goals of state conservation plans.
 - b. Adequate funding must be budgeted by the federal agencies for conservation efforts on federal lands.
 - c. The proportion of a species' habitat that occurs on federal land should inform the federal agencies' level of commitment to conservation of that species. States and local governments cannot bear a disproportional burden for species conservation when federal management practices are a dominating factor in the likelihood of a species' success.
8. Federal funding for state conservation of species including State and Tribal Wildlife Grants and Section 6 funds must remain robust. States rely on these grants to support and leverage state management of non-game species.
9. Governors support legislative initiatives, court rulings, petitions or regulatory measures which allow local, state, federal and private conservation efforts adequate time to be implemented and demonstrate their efficacy.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Governors direct the WGA staff, where appropriate, to work with Congressional committees of jurisdiction and the Executive Branch to achieve the objectives of this resolution including funding, subject to the appropriation process, based on a prioritization of needs.
2. Furthermore, the Governors direct WGA staff to develop, as appropriate and timely, detailed annual work plans to advance the policy positions and goals contained in this resolution. Those work plans shall be presented to, and approved by, Western Governors prior to implementation. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual work plans.



**Western Governors' Association
Policy Resolution 2014-14**

State Wildlife Science, Data and Analysis

A. BACKGROUND

1. Large intact and functioning ecosystems, healthy fish and wildlife populations, and abundant public access to natural landscapes are significant contributing factors to the West's economy and quality of life.
2. Wildlife-associated recreation — including hunting, fishing, and wildlife watching — generates over \$65 billion annually in 19 western states.
3. States possess broad trustee, police powers and primacy over the management of fish and wildlife within their borders. States work cooperatively with federal agencies on species and habitat issues throughout the West.
4. Federal and state agencies need data-driven science, mapping and analysis to manage species and habitat. State wildlife agencies often have the best available science on species and retain primary jurisdiction over most wildlife on Federal, State, and private lands. The federal government should recognize and fully utilize state resources, including scientific information about species population numbers, conservation status, and habitat availability, among other data. That same information is needed to address other challenges, including the potential listing of species (such as the greater sage-grouse), spread of invasive species and the impacts of drought, water transfers and energy development.
5. Western Governors established the Western Governors' Wildlife Council to identify crucial wildlife habitats in the West. In December 2013, the Wildlife Council launched the Western Governors' Crucial Habitat Assessment Tool (CHAT) that depicts crucial wildlife habitat across 16 western states in a user-friendly GIS tool.
6. CHAT is a non-regulatory tool to help guide project planners to wildlife information resources in individual states. Providing these data and maps in one place through CHAT offers efficient and effective analytical tools and information to industry and the public. The level of information available in this map will facilitate project pre-planning in sectors like energy, transportation, and conservation.

B. GOVERNORS' POLICY STATEMENT

1. Western Governors direct the Western Governors' Wildlife Council to continue its guidance in the development, management and implementation with partners of the state CHATs and Western Governors' CHAT.
2. Western Governors urge federal agencies to work directly with states to obtain and use state fish and wildlife data and analyses as principal sources to inform their land use, land planning and related natural resource decisions. Federal agencies should also provide their data to state wildlife managers to ensure that the most complete data is available to be incorporated into the CHATs and other decision support systems.
3. The Governors encourage widespread use of CHATs by industry, the public, and state and federal agencies. Planners at all levels in the public and private sectors can use state CHATs as a "first look" to help identify where states' wildlife assets are located.
4. State wildlife science, data and analyses are invaluable tools for informing federal project planning and/or research efforts related to wildlife management. It is critical to have current information to update the state databases on a regular basis. Western Governors encourage federal –state coordination on wildlife data collection to avoid spending scarce resources duplicating data collection efforts.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Governors direct the WGA staff, where appropriate, to work with Congressional committees of jurisdiction and the Executive Branch to achieve the objectives of this resolution.
2. Furthermore, the Governors direct WGA staff to develop, as appropriate and timely, detailed annual work plans to advance the policy positions and goals contained in this resolution. Those work plans shall be presented to, and approved by, Western Governors prior to implementation. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual work plans.

This Western Governors' Association Policy Resolution 14-14 State Wildlife Science, Data and Analysis as adopted by the Governors replaces WGA Policy Resolution 13-04 Conserving Wildlife and Crucial Habitat in the West.



Matthew H. Mead
Governor of Wyoming
Chairman

Steve Bullock
Governor of Montana
Vice Chair

James D. Ogsbury
Executive Director

Headquarters
1600 Broadway
Suite 1700
Denver, CO 80202

303-623-9378
Fax 303-534-7309

Washington, D.C.

400 N. Capitol Street, N.W.
Suite 376
Washington, D.C. 20001

202-624-5402
Fax 202-624-7707

www.westgov.org

September 18, 2015

Mr. Douglas Krofta
U.S. Fish and Wildlife Service
Division of Conservation and Classification
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Docket FWS-HQ-ES-2015-0016

Dear Mr. Krofta:

Western Governors respectfully submit these comments on *Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Petitions* [80 FR 29286, May 21, 2015]. We appreciate the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (referred to collectively as "the Services") initiating a rulemaking to clarify the petition submission process and enhance the role of states in the process.

STATEMENT OF INTEREST:

The Western Governors' Association (WGA) represents the governors of 19 Western States and three United States flag islands. The Association is an instrument of the governors for bipartisan policy development, information exchange and collective action on issues of critical importance to the Western United States.

Western Governors recognize the important role the Services play in administering the petition process under the Endangered Species Act (ESA or Act), which includes evaluating species for listing, determining if a listed species should be reclassified, and considering revisions to critical habitat designation as needed. However, at the time of any petition for listing, most species are regulated by State wildlife management agencies, and therefore states, too, play a critical role in the management of wildlife. States conduct research and on-the-ground analysis on species' status and adopt policies and take steps to prevent species from becoming imperiled. In many cases, they actively implement conservation measures in concert with local governments and private parties that aid in recovery of at-risk species. States likely also have similar information and programs for listed species.

ESA Section 6 requires the Services to cooperate with states to the maximum extent practicable in implementing the Act. States should be full partners in listing, recovery and delisting decisions. Governors encourage federal agencies to use sound science in ESA decisions with state fish and wildlife data and analyses

Mr. Douglas Krofta
 September 18, 2015
 Page 2

as principal sources. WGA Policy Resolutions 13-08 Endangered Species Act, 14-11 Species of Concern and Candidate Species, 14-14 State Wildlife Science, Data and Analysis, and 14-09 Respecting State Authority and Expertise memorialize WGA positions.

WESTERN GOVERNORS' ANALYSIS AND RECOMMENDATIONS:

In this rulemaking, the Services propose to change the petition process in current regulations (50 CFR 424.14). For the last two years, Congress has directed the Services to use state fish and wildlife data and analyses as principal sources to inform land use, land planning and related natural resource decisions.¹ The Services are recommending these common sense process reforms. The proposals are responsive to Congressional directives and Western Governors' appeals for stronger recognition of states' expertise in wildlife management and conservation.

Western Governors offer the following comments on the specifics of the Services' proposed rule:

One Species at a Time

The Services propose paragraph (b)(2) which would require that each petition address a single species and not multi-species. Western Governors agree that the inclusion of multiple species in a single petition complicates the determination and confuses the question of what data pertains to a given species. Limiting a petition to a single species will facilitate data submission and ensure the data is pertinent to the species in question. We support this focus on one species at a time.

State Consultation

Western Governors support the proposal (proposed paragraph (b)(9)) that petitions submitted to FWS be required to include state provided data or comments and that petitions be copied to the state agency(ies) responsible for the species' management. This requirement, if adopted, should also apply to petitions filed with the NMFS. If a species is imperiled, the petitioner should know the species' range and be able to consult relevant states. As the proposed rule notes, states have substantial experience, expertise and information relevant to species conservation and are generally responsible for their management unless the species is federally listed. Western Governors urge the use of state data and expertise in all aspects of the ESA, including evaluating a species' conservation status. This measure also puts the Services in accord with Congressional directives to use state fish and wildlife data and analyses as principal sources to inform natural resource decisions.

The rulemaking proposes that petitioners provide petitions to states at least 30 days prior to submission to the FWS. Given the considerable time needed to assemble complete information on

¹ "State Wildlife Data." Congressional Record 160:9 (January 15, 2014) p. H971. Accessed 06/19/15.

"State Wildlife Data." Congressional Record 160:151 (December 11, 2014) p. 9759. Accessed 06/19/15.

Mr. Douglas Krofta
 September 18, 2015
 Page 3

a petition, Western Governors advocate for state agencies to have a minimum of at least 60 days to provide information to petitioners. This will help states ensure that the petitioner and the Services (if the NMFS is subject to this requirement) have the complete information on the species in question.

The laws of individual states will guide how data is provided to petitioners. For example, states may choose to aggregate data to protect sensitive landowner information. In some cases, states have agreements that would allow more detailed data to be provided directly to a federal agency that cannot be provided to petitioners as members of the general public. Governors encourage the Services to make direct inquiries to state agencies when questions arise or additional information is needed.

Available, Relevant State Data

The Services' proposal (proposed paragraph (b)(10)) requiring petitioners to certify that all relevant information readily available from affected states has been gathered is a valuable mechanism to ensure state science is considered during petition review. The Services outline two alternatives for executing this proposal – one requires petitioners to gather and submit all relevant information readily available (including from state websites) and the next limits this requirement to relevant information publicly available on affected states' websites. Western Governors support the first alternative. It requires petitioners to consider information sources beyond those published online. Petitioners should be required to cite the sources of the information they provide.

Incomplete Petitions

Western Governors support the Services screening any petition requests that do not contain required elements under Section 424.14(b). This provision encourages complete petitions that include state data and information. It also ensures that resources are directed to requests that are ready for review.

The final rule should clarify that petitions must also be complete when provided to states. This allows the states to fully understand the petition and to provide relevant data. Petitioners should not be allowed to submit incomplete petitions as a way to obtain data and information necessary to complete the petition. If the petitioner changes the scope or significant content of the petition after receiving the states' information, it should be required that the petition be resubmitted to the states prior to final submission to the FWS.

Magnitude and Immediacy of Threats

Long-standing guidance requires the FWS to assess the magnitude and immediacy of threats to a species (48 FR 43098, September 21, 1983). The pending rulemaking suggests (proposed paragraph (c)(3)) that petitioners provide a description of the magnitude and immediacy of threats. Should

Mr. Douglas Krofta
 September 18, 2015
 Page 4

petitioners be required to provide this information, they should also be required to include any state assessments of the magnitude and immediacy of threats. It is then incumbent on the FWS to do its own assessment of petitioner evaluations of the magnitude and immediacy of threats. Petitioner assessments cannot replace an independent obligation of the Services.

Critical Habitat Designation

Proposed paragraph (d)(6) should be rewritten to include language consistent with proposed paragraph (b)(10) and require "all relevant information that is readily available" be provided for consideration in a critical habitat designation. We support requiring citations for the information petitioners provide.

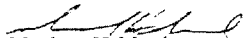
Substantial Information Standard

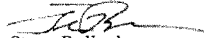
Western Governors agree with proposed paragraph (g)(1)(i) that statements made in a petition without the support of credible scientific or commercial information should not meet the "substantial information" standard.

CONCLUSION:

Western Governors support the Services' work to refine the petition process and promote utilization of state data and expertise. We recommend extending – to a minimum of 60 days – the time for states to respond to petitioners. States look forward to a higher level of engagement with petitioners and the Services in evaluating the status of species.

Sincerely,


 Matthew H. Mead
 Governor, State of Wyoming
 Chairman, WGA


 Steve Bullock
 Governor, State of Montana
 Vice Chair, WGA

cc: Honorable Sally Jewell, Secretary, U.S. Department of the Interior
 Dan Ashe, Director, U.S. Fish and Wildlife Service
 Gary Frazer, Assistant Director for Endangered Species, U.S. Fish and Wildlife Service
 Donna Wieting, Director, Office of Protected Resources, National Marine Fisheries Service



Brian Sandoval
Governor of Nevada
Chairman

John A. Kitzhaber, M.D.
Governor of Oregon
Vice Chairman

James D. Ogsbury
Executive Director

Headquarters:
1600 Broadway
Suite 1700
Denver, CO 80202
303-623-9378
Fax 303-534-7309

Washington, D.C. Office:
400 N. Capitol Street, N.W.
Suite 376
Washington, D.C. 20001

202-624-5402
Fax 202-624-7707

www.westgov.org

November 6, 2014

Mr. Jim Serfis
U.S. Fish and Wildlife Service
Branch of Communication and Candidate Conservation
4401 N Fairfax Drive, Suite 420
Arlington, VA 22203

Dear Mr. Serfis:

Western Governors respectfully submit these comments on the draft *Policy Regarding Voluntary Prelisting Conservation Actions* [79 FR 42525, July 22, 2014]. We encourage initiatives to incentivize voluntary conservation actions in order to preclude the need for additional species listings under the Endangered Species Act (ESA).

STATEMENT OF INTEREST:

The WGA represents the Governors of 19 Western states and 3 United States flag islands. The Association is an instrument of the Governors for bipartisan policy development, information exchange and collective action on issues of critical importance to the Western U.S.

Western Governors support the provision of economic incentives for landowners to participate in voluntary conservation efforts. This position is memorialized in Western Governors' Association (WGA) Policy Resolutions 13-08 Endangered Species Act and 14-11 Species of Concern and Candidate Species.

WESTERN GOVERNORS' ANALYSIS AND RECOMMENDATIONS:

Western Governors appreciate that the public comment period was extended to Nov. 6, 2014. As noted in our previous letter, however, Governors believe a longer extension is necessary to permit FWS, states and stakeholders to jointly refine objectives, implementation mechanisms and metrics. It is vital that such an effort be completed before this draft policy is finalized.

There are several aspects of this proposed policy that bear refinement through the cooperative efforts of Western Governors and FWS:

Retroactive Credits

The draft policy states that actions taken prior to finalization of the policy will

Mr. Jim Serfis
November 6, 2014
Page 2

not be eligible for credits. Western Governors support the retroactive award of credits to landowners who proactively implement conservation actions prior to enactment of the policy. Private landowners who have already undertaken significant voluntary measures to conserve wildlife on their lands should receive credit for their efforts.

Transferability and Geographic Area

FWS's draft policy indicates that credit systems must operate on a state-by-state basis. This approach does not reflect on-the-ground realities. In many cases, species at risk occupy habitats that cross state lines. Western Governors encourage FWS to utilize an approach that provides for credits to be transferred beyond state political boundaries but within scientifically defensible bounds. This would be particularly useful for situations where conservation is undertaken as part of a multi-state-administered program.

Conservation Value and Economic Signals

Although the states are tasked with developing conservation programs to establish a framework for allocating credits, the draft policy designates FWS as the entity responsible for establishing the value of credits. The draft policy states, "the Service will evaluate the conservation value of a prelisting conservation action based on its inclusion and priority in a conservation strategy for the species."

Western Governors recommend that states take the lead in establishing credit and debit systems, subject to FWS evaluation of their methodologies. These systems, as well as the FWS's evaluation methodology, should be adaptable as new science and improved practices emerge.

Implementation of a valuation procedure is an important driver of voluntary conservation actions. Landowners need clear economic signals to evaluate the potential return on their investment in voluntary conservation actions. Participation by landowners will be depressed without such predictability. Credit buyers similarly will be incentivized to utilize the credit system with increased certainty about credit valuation.

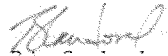
Federal Credits

As drafted, the policy permits any entity, including federal agencies, to earn credits for voluntary prelisting conservation actions. Western Governors recommend that federal credits be managed in the same system as those earned by non-federal property owners.

Mr. Jim Serfis
November 6, 2014
Page 3

Under section 6 of ESA, FWS is required to cooperate "to the maximum extent practicable with the States" in implementation of the Act. To best promote the cooperation contemplated by the law, Western Governors require direct engagement via conversations with the Service to provide more clarity on its intentions regarding the draft policy. Western Governors request that FWS delay finalization of this policy until FWS consults in a meaningful way with each interested state.

Sincerely,



Brian Sandoval
Governor, State of Nevada
Chairman, WGA



John Kitzhaber, M.D.
Governor, State of Oregon
Vice Chairman, WGA

cc: Honorable Sally Jewell, Secretary, U.S. Department of the Interior
Dan Ashe, Director, U.S. Fish and Wildlife Service

ⁱ Western Governors comments from 09/16/2014



Brian Sandoval
Governor of Nevada
Chairman

John A. Kitzhaber, M.D.
Governor of Oregon
Vice Chairman

James D. Ogsbury
Executive Director

Headquarters:
1600 Broadway
Suite 1700
Denver, CO 80202
303-623-9378
Fax 303-534-7309

Washington, D.C. Office:
400 N. Capitol Street, N.W.
Suite 376
Washington, D.C. 20001
202-624-5402
Fax 202-624-7707
www.westgov.org

October 9, 2014

Mr. Douglas Krofta
U.S. Fish and Wildlife Service
Division of Conservation and Classification
4401 N Fairfax Drive, Suite 420
Arlington, VA 22203

Dear Mr. Krofta:

Western Governors respectfully submit to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the "Services") the following comments on the Notice of Proposed Rulemaking (NOPR) for *Implementing Changes to the Regulations for Designating Critical Habitat* [79 FR 36284, June 26, 2014 and 79 FR 27066, May 12, 2014]. Thank you for extending the public comment period to provide states a reasonable period of time in which to respond to the proposed draft.

Our comments below focus on:

- The need to ensure the use of sound science in critical habitat designations, drawing in particular from state science and coordination with state agencies to do proper modeling of scientific trends and economic impacts of potential designations.
- Stressing that critical habitat is, by definition, the areas **essential** for conservation of a species and therefore should not be unduly expanded beyond that scope.

Western Governors request that this proposed rule be reworked in cooperation with Western states and utilizing our state data to reach a more legally-defensible result and foster partnership.

Stated Purpose of the Proposed Rule:

In the Endangered Species Act (ESA) Section 3(5)(A), critical habitat is defined as:

- (i) the **specific areas** within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) **essential** to the conservation of the species and (II) which

Mr. Douglas Krofta
 October 9, 2014
 Page 2

may require special management considerations or protection; and (ii) **specific areas** outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are **essential** for the conservation of the species [emphasis added].

This definition emphasizes that critical habitat includes specific geographic areas, containing particular physical or biological attributes, that are occupied by the species at the time of listing or unoccupied areas determined by the Secretary to be essential for species conservation.

ESA Section 4 says that:

The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.

In the NOPR, the Services state that “the purpose of critical habitat is to identify the areas that are *or will be* [emphasis added] essential to the species’ recovery.” Designating areas that “will be” essential to species recovery requires a determination by the Secretary using the best scientific data available.

The proposed rule notes that “unoccupied areas must be essential for the conservation of the species, but need not have the features essential to the conservation of the species...In other words, the Services may identify areas that *do not yet* [emphasis added] have the features, or degraded or successional areas that once had the features, or areas that contain sources of or provide the processes that maintain the features as areas essential to the conservation of the species.” The proposed rule notes that “best available scientific data” will be used to evaluate whether an unoccupied area could develop the needed features and is essential for the conservation of a species. At a minimum, the Service should provide a thorough, data-based explanation of the basis for the determination that areas outside the range occupied at the time of listing are or will be essential habitat.

Western Governors’ Analysis and Recommendations:

➤ **Best Available Scientific Data**

The Governors find it imperative that sound science form the basis for critical habitat determinations, with an emphasis on state science, data and analyses. This includes using best available economic science data considered in designating critical habitat.

Mr. Douglas Krofta
 October 9, 2014
 Page 3

The importance of using sound science in ESA decisions, particularly from the states, is cited in the Western Governors' Association (WGA) Policy Resolution 13-08 *Endangered Species Act*. In addition, WGA Policy Resolution 2014-14 *State Wildlife Science, Data and Analysis* urges federal agencies to work directly with states to obtain and use state fish and wildlife data and analyses as principal sources to inform land planning decisions. Congress, in its FY 2014 Committee on Appropriations report on the Department of the Interior's budget, supported the Governors' position by directing Interior to use state fish and wildlife data and analyses as principal sources to inform land use, land planning and related natural resource decisions.

The proposed rule states, "The Services anticipate that critical habitat designations in the future will likely increasingly use the authority to designate specific areas outside the geographical area occupied by the species at the time of listing."

Use of state expertise and experience on the ground should extend to situations where the Services seek to use forward-looking modeling to forecast areas that "will be" species habitat in the future. As noted in the WGA Policy Resolution 13-08 *Endangered Species Act*, states should be full partners to federal agencies in developing and utilizing mutually acceptable predictive techniques.

➤ **Focus on Essential Habitat**

The Services recommend deleting a provision in Section 50 CFR 424.12(e) which provides that the Secretary can designate areas outside the geographical area presently occupied by a species only when "a designation limited to its present range would be inadequate to ensure the conservation of the species." While it may be the case that designating unoccupied habitat as critical habitat is beneficial to species recovery, under the ESA critical habitat, by definition, should include only those areas "essential" to conservation of the species.

Designation of critical habitat has real repercussions, particularly for landowners who may not be able to stay in business when land uses are restricted. As the Governors note in WGA Policy Resolution 2014-11 *Species of Concern and Candidate Species*, the negative economic impacts of federal ESA decisions fall solely on states, local communities, businesses, jobs and private property owners.

In this proposed rule, the Services propose that the scale of critical habitat designations be "at a scale determined by the Secretary to be appropriate" and give the Secretary the discretion to determine the scale used. Here once again we emphasize the need for using sound science, relying on state expertise. Although the proposed rule mentions information the Secretary may consider such as life history, the scale of available data,

Mr. Douglas Krofta
October 9, 2014
Page 4

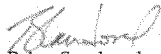
and biological and geophysical boundaries, it does not state that this information must be drawn from the best available science.


States have invaluable expertise that the Services should draw upon; coordinating with the states is an important part of appropriately designating critical habitat. The Services also need to document their rationale as decisions are made throughout the designation process.

Building on the sound science concept, when critical habitat is designated it should be tied to a definable objective in a recovery plan. This will help ensure that the habitat designated is only the land most essential to recovering a species.

As emphasized in WGA Policy Resolution 13-08, broad designation of critical habitat federalizes state, county, municipal, and private lands, adding unnecessary and uncompensated burdens and costs. Since ESA Section 4 calls for the Secretary to consider economic impacts when designating critical habitat, we underscore that designation of critical habitat is a costly enterprise and should be utilized only to cover the areas essential to conservation of a listed species, not the entire species' range. Western Governors look forward to working collaboratively to rework this proposed rule such that it meets our mutual interests and objectives.

Sincerely,


Brian Sandoval
Governor, State of Nevada
Chairman, WGA


John Kitzhaber
Governor, State of Oregon
Vice Chairman, WGA

cc: Honorable Sally Jewell, Secretary, U.S. Department of the Interior
Honorable Penny Pritzker, Secretary, U.S. Department of Commerce
Dan Ashe, Director, U.S. Fish and Wildlife Service
Eileen Sobock, Assistant Administrator for Fisheries, National Marine Fisheries Service



Brian Sandoval
Governor of Nevada
Chairman

John A. Kitzhaber, M.D.
Governor of Oregon
Vice Chairman

James D. Ogsbury
Executive Director

Headquarters:
1600 Broadway
Suite 1700
Denver, CO 80202

303-623-9378
Fax 303-534-7309

Washington, D.C. Office:
400 N. Capitol Street, N.W.
Suite 376
Washington, D.C. 20001

202-624-5402
Fax 202-624-7707

www.westgov.org

October 9, 2014

Ms. Patrice Ashfield
U.S. Fish and Wildlife Service
Division of Environmental Review
4401 N Fairfax Drive, Suite 420
Arlington, VA 22203

Dear Ms. Ashfield:

Western Governors respectfully submit to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the "Services") the following comments on the Notice of Proposed Rulemaking for *Definition of Destruction or Adverse Modification of Critical Habitat* [79 FR 36284, June 26, 2014 and 79 FR 27060, May 12, 2014]. Thank you for extending the public comment period to provide states a reasonable period of time in which to respond to the proposed draft.

Western Governors request that this proposed rule be reworked in cooperation with Western states and utilizing our state data to reach a more legally-defensible result and foster partnership.

Stated Purpose of the Proposed Rule:

The Services are undertaking this rulemaking to clarify several definitional terms under Section 7 of the Endangered Species Act (ESA).

Definition of "Destruction or Adverse Modification" / "Conservation Value"

In the past, the Services operated under regulations governing interagency cooperation under ESA Section 7 (50 CFR 402) which provided the following definition for "destruction or adverse modification" of critical habitat:

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

Ms. Patrice Ashfield
 October 9, 2014
 Page 2

In the proposed rule, the Services note that in *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001), the court found that this

“regulatory definition [of destruction or adverse modification] set too high a threshold for triggering adverse modification by its requirement that both recovery and survival be diminished before adverse modification would be the appropriate conclusion.” A 2004 case before the Ninth Circuit Court of Appeals, *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 found that “the purpose of establishing ‘critical habitat’ is for the government to designate habitat that is not only necessary for the species’ survival but also essential for the species’ recovery.”

In response to these court decisions, the Services are proposing the following new definition:

“Destruction or adverse modification” means a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species. Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery [italics added].

In addition, this proposed definition introduces the new term “conservation value,” defined as:

The contribution the critical habitat provides, or has the ability to provide, to the recovery of the species.

The proposed definition for this new term does not speak to species survival as directed by the courts in 2004.

Definition of “Appreciably Diminish”

The Services suggest that the current definition of “appreciably diminish” was invalidated by the courts because it hinged on “both” survival and recovery of a listed species. That definition read:

Appreciably diminish the value - to considerably reduce the capability of designated or proposed critical habitat to satisfy requirements essential to both the survival and recovery of a listed species.

The Services note that the use of the term “considerable” in this definition may lead to disparate outcomes in consultations due to varying interpretations of what is “considerable.” The Services have suggested a new means of determining “appreciably diminish” which would apply if “there is a diminishment to the value of the critical habitat that has some relevance

Ms. Patrice Ashfield
 October 9, 2014
 Page 3

because we can recognize or grasp the quality, significance, magnitude, or worth of the diminishment in a way that affects the conservation value of the critical habitat.”

Western Governors’ Analysis and Recommendations:

➤ **Changes to Definition of “Destruction or Adverse Modification”**

The proposed definition of “destruction or adverse modification” cites effects that “significantly delay” the development of physical or biological features but does not benchmark what constitutes a “significant delay.” If this term is utilized, it must be better defined.

Western Governors recommend that rather than introduce the new term “conservation value” and include the ambiguity of what constitutes “significantly delay” that the first sentence of the proposed definition of “destruction or adverse modification” be changed to:

“Destruction or adverse modification” means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the survival and/or recovery of a listed species.

This language is in keeping with the current definition, but addresses the courts’ concerns that critical habitat be designated for both species survival and recovery. It removes the word “both” and uses “and/or” to indicate that the diminishment of value that could result in a “destruction or adverse modification” determination could relate to habitat for survival or recovery or both (but need not be both as the court indicated in 2001).

The second sentence of the new proposed definition of “destruction or adverse modification” goes far beyond the scope of the definition as it currently stands. The proposed definition suggests that “destruction or adverse modification” extends to actions that “preclude or significantly delay the development” of physical or biological features needed for species recovery. Such a definition requires the Services to forecast or model that an area is capable of 1) developing those physical or biological features in the first place and 2) that the proposed measure would further “preclude or significantly delay the development” of those features. That would seem a complex process to resolve for many actions that would necessitate Section 7 consultation.

Moreover, this proposed language appears to emphasize “development” of physical or biological features in designated critical habitat, implying that the designated critical habitat does not currently contain those features, but may include them at some point in

Ms. Patrice Ashfield
 October 9, 2014
 Page 4

the future. Such an application runs counter to the plain language of the ESA, which defines critical habitat as: “the specific areas within the geographical area occupied by the species [at the time of listing] . . . on which *are found* those [essential] physical or biological features” Section 3(5)A(i); italics added. The statutory language is worded in the present tense, indicating that those features must already be “found” in an area in order for it to be designated as critical habitat. If an area being considered for designation as critical habitat does not currently contain those physical and biological features, by definition, those features cannot be “essential” to the survival or recovery of a listed species.

Instead of the language proposed by the Services, Western Governors recommend that the second sentence in the “destruction or adverse modification” definition retain the same language currently in place (with small changes for clarity). That language allows for consideration of the physical and biological features that were the basis for determining habitat to be critical in the first place. Given that the Services indicated in the NOPR for *Implementing Changes to the Regulations for Designating Critical Habitat* 79 FR 36284, June 26, 2014 and 79 FR 27066, May 12, 2014 that “the purpose of critical habitat is to identify the areas that are *or will be* [italics added] essential to the species’ recovery,” then this definition captures those physical and biological features that “will be” essential to species recovery but have not yet developed. However, as noted in Western Governors comments on that NOPR, we feel that designation of critical habitat should be focused on areas that have already been identified as essential to species recovery, not areas that may perhaps be essential at some unknown future date.

In summary, Western Governors would propose this alternate definition of “destruction or adverse modification”:

“Destruction or adverse modification” means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the survival and/or recovery of a listed species. Such alterations may include, but are not limited to, actions adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

➤ **Change to Definition of “Appreciably Diminish”**

Western Governors find that this newly proposed method of determining “appreciably diminish” has merit but unnecessarily introduces the “conservation value” concept. We recommend using the language that replaces “considerably” but retains the emphasis on the requirements, i.e., the physical and biological features determined by the Service to be essential for species survival and recovery, from the current definition. We propose the following definition:

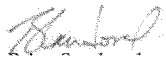
Ms. Patrice Ashfield
October 9, 2014
Page 5


Appreciably diminish the value - to reduce the value of the critical habitat such that the Service can recognize and document the quality, significance, magnitude, or worth of the diminishment of the physical or biological features that were the basis for determining the habitat to be critical.

Conclusion:

Western Governors believe that the Services' proposed changes to the definition of "destruction or adverse modification" of critical habitat requires excessive conjecture about "conservation value," as well as when and where essential physical or biological features may develop in the future. For that reason, we have put forward an alternate definition we find more in keeping with the findings of the courts and the elements essential for species conservation. Western Governors would like to collaborate with the Services to incorporate this definition into a revised rule.

Sincerely,


Brian Sandoval
Governor, State of Nevada
Chairman, WGA


John Kitzhaber
Governor, State of Oregon
Vice Chairman, WGA

cc: Honorable Sally Jewell, Secretary, U.S. Department of the Interior
Honorable Penny Pritzker, Secretary, U.S. Department of Commerce
Dan Ashe, Director, U.S. Fish and Wildlife Service
Eileen Sobeck, Assistant Administrator for Fisheries, National Marine Fisheries Service



Brian Sandoval
Governor of Nevada
Chairman

John A. Kitzhaber, M.D.
Governor of Oregon
Vice Chairman

James D. Ogsbury
Executive Director

Headquarters:
1600 Broadway
Suite 1700
Denver, CO 80202

303-623-9378
Fax 303-534-7309

Washington, D.C. Office:
400 N. Capitol Street, N.W.
Suite 376
Washington, D.C. 20001

202-624-5402
Fax 202-624-7707

www.westgov.org

October 9, 2014

Mr. Douglas Krofta
U.S. Fish and Wildlife Service
Division of Conservation and Classification
4401 N Fairfax Drive, Suite 420
Arlington, VA 22203

Dear Mr. Krofta:

Western Governors respectfully submit to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the "Services") the following comments on the draft *Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act* [79 FR 36330, June 26, 2014 and 79 FR 27052, May 12, 2014]. Thank you for extending the public comment period to provide states a reasonable period of time in which to respond to the proposed draft.

Western Governors want to see this draft policy updated such that a single set of criteria are utilized for discretionary exclusion analysis, holding all parties to the same standards and evaluations.

Stated Purpose of the Draft Policy:

Section 4 of the Endangered Species Act (ESA) outlines the framework for designation of critical habitat. The Act provides that "[t]he Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned" [Section 4(b)(2)].

The Services have put forward this draft policy to clarify their position on how they consider partnerships and conservation plans in the exclusion process.

Western Governors' Analysis and Recommendations:

➤ **Criteria for Exclusions**

Western Governors agree with the Services that it is desirable to have greater predictability and transparency regarding how exclusions from critical

Mr. Douglas Krofta
 October 9, 2014
 Page 2

habitat are determined. However, we have concerns about how the Services propose to evaluate state conservation plans under this draft policy.

As noted in the Federal Register (79 FR 27052), the Services sometimes exclude specific areas from critical habitat designations if there is a private or other non-federal conservation plan, or a plan developed in partnership with the Services such as a habitat conservation plan (HCP), safe harbor agreement (SHA), or candidate conservation agreement with assurances (CCAA).

In the draft policy on exclusions from critical habitat, the Services have outlined different conditions for exclusion for HCPs, SHAs and CCAs versus all other conservation plans (including state plans). The former must only meet three conditions, while the latter are evaluated based on eight factors. Justification is not provided for why two different sets of criteria are being proposed. We note, for example, that HCP/SHA/CCAA plans need only be “properly implemented” while other conservation plans must show not only implementation but also “success of the chosen mechanism.” No explanation for this difference is provided.

Western Governors oppose the application of two different sets of criteria for the discretionary exclusion analysis. All plans should be held to the same threshold for exclusion consideration. States spend enormous amounts of time to craft species conservation plans. Those plans are developed and implemented based on extensive scientific expertise housed in state wildlife agencies. They are crafted to meet state and federal laws, rules and regulations applicable to the protection of wildlife.

Congress, in its FY 2014 Committee on Appropriations report on the Department of the Interior’s budget, directed the Department of the Interior cooperatively engage with state wildlife agencies and use state fish and wildlife data and analyses as principal sources to inform land use, land planning and related natural resource decisions. Clearly, state plans should be considered for evaluation under the same standard for exclusion from critical habitat as HCPs, SHAs, and CCAs where a state plan has been developed to address equivalent interests for the listed species.

➤ **Prioritization of Federal Lands for Species Recovery**

We are encouraged to see that, under the draft policy, lands owned by the federal government will be prioritized over state and private lands as sources of support for species recovery for the designation of critical habitat, where such a designation is determined to be the most effective tool. We applaud this commitment to species recovery by prioritizing conservation efforts on federal lands as called for in Western

Mr. Douglas Krofta
 October 9, 2014
 Page 3

Governors' Association (WGA) Policy Resolution 2014-11 *Species of Concern and Candidate Species*.

➤ **Consideration of Economic Impacts**

ESA listing decisions have real economic impacts for state and local governments, through restriction on rangeland grazing, hunting, tourism and development of resources on public and private lands. As WGA Policy Resolution 2014-11 underscores, the negative impacts of federal ESA decisions fall squarely on states, local communities, businesses, jobs and private property owners.

We agree with your assessment that economic impacts can play an important role not only in designation of critical habitat writ large, but also in the discretionary exclusion analysis under Section 4(b)(2). It may well be the case that the economic benefits of exclusion outweigh the conservation benefits of inclusion. Such situations should be recognized by the Services and granted exclusion in order to provide maximum flexibility for a balanced mix of conservation and economic activities.

Conclusion:

In summary, Western Governors find it arbitrary to have two different sets of criteria for discretionary exclusion analysis. We believe the Policy could be greatly improved by applying the same criteria to all conservation plans. Those criteria should be based on what information is truly needed to weigh the benefits of exclusion and inclusion as critical habitat.

We are pleased to see that federal agencies will prioritize critical habitat on federal lands, leaving greater management flexibility on state and private lands. It is essential that economic impacts continue to be considered as critical habitat decisions are made by the Services as such decisions have real effects on states and our citizens.

Sincerely,



Brian Sandoval
 Governor, State of Nevada
 Chairman, WGA



John Kitzhaber
 Governor, State of Oregon
 Vice Chairman, WGA

cc: Honorable Sally Jewell, Secretary, U.S. Department of the Interior
 Honorable Penny Pritzker, Secretary, U.S. Department of Commerce
 Dan Ashe, Director, U.S. Fish and Wildlife Service
 Eileen Sobock, Assistant Administrator for Fisheries, National Marine Fisheries Service

Environment and Public Works Committee
briefing entitled, "Fish and Wildlife Service: The President's FY2016 Budget Request for
the Fish and Wildlife Service and Legislative Hearing on Endangered Species Bills"
Questions for the Record for Governor Matthew H. Mead
September 29, 2015

Chairman Inhofe:

- 1) There has been considerable criticism of the restrictive nature of BLM's land use plans that were signed at the same time as the not-warranted decision. What impact do you anticipate for oil and gas development in your state as a result of these plans?
- 2) There has been some economic analysis that indicates that the land use plan impacts would be expected to exceed that of what would have resulted from a listing decision for greater sage grouse. What is your response to that analysis?
- 3) There was a great deal of dialogue from governors regarding their view that the economic outcome and the recovery of the bird would have been better off by deferring to state sage grouse plans. What reforms need to be in place to ensure that states have a greater role in listing decisions?
- 4) Would species recovery be better served if states have a far greater role under the ESA?
- 5) Do you believe that data on behalf of state wildlife agencies should be given the same weight and deference as that of FWS data in listing determinations?

MATTHEW H. MEAD
GOVERNOR



STATE CAPITOL
CHEYENNE, WY 82002

Office of the Governor

November 3, 2015

The Honorable James M. Inhofe
Chairman
U.S. Senate Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Responses to October 21, 2015 letter on oversight hearing before the Subcommittee on Fisheries, Water, and Wildlife.

Dear Chairman Inhofe,

I appreciated the opportunity to speak to your committee about the Endangered Species Act.

The Resource Management Plans (RMP) prepared by the Bureau of Land Management for Wyoming were closely monitored throughout their development, including the consistency review process. The impact on oil and gas development in Wyoming is not expected to be considerably different than the management scenario industry has operated under in Wyoming since 2008. I am unable to identify the specific economic analysis that you reference in your letter. Wyoming has done several economic analyses. Each shows some degree of economic impact, under any management strategy including Wyoming's own management strategy. For example, in a draft University of Wyoming study (expected to be complete later this year), the economic impact of the Approved RMPs – direct economic impact from commodity production (focusing on oil and gas, grazing and wind energy) will decrease by \$792.7 million. Conversely under an Endangered Species Act listing, direct economic impact from commodity production could decrease up to \$4.1 billion. As you can see, the economic impact of the RMPs in Wyoming is not expected to exceed the anticipated impact of a listing decision for the Greater sage-grouse. I believe a listing would have resulted in greater negative impact on Wyoming.

Well-constructed state plans should be used to guide management of the Greater sage-grouse in each state. Each state requires flexibility to address the unique nature of its geography and the status of the Greater sage-grouse within its borders. Each state also requires the ability to consider a plan within the framework of its people, law and culture. State involvement in management and recovery benefits species. States are generally in a better position to manage and recover species and should be afforded a greater role under the Endangered Species Act.

Chairman Inhofe
RE: Responses to October 21, 2015 letter
Page 2

State wildlife managers are generally closer to the ground and, unless a species is under federal management, have trust responsibilities to manage species within a state's borders. As a result, I believe that state wildlife agency data should be given the same weight and deference as U.S. Fish and Wildlife Service data in listing determinations.

Sincerely,

A handwritten signature in dark ink, appearing to read "Matthew H. Mead", with a stylized flourish at the end.

Matthew H. Mead
Governor

MHM:dh

Senator INHOFE. Thank you, Governor Mead, and thank you for your leadership on this. And I can assure you we are very interested in working with the Western Governors Association on common sense ESA reforms, so we will continue to do that.

Governor Bullock.

STATEMENT OF STEVE BULLOCK, GOVERNOR, STATE OF MONTANA, VICE CHAIRMAN, WESTERN GOVERNORS' ASSOCIATION

Mr. BULLOCK. Thank you so much, Chairman Sullivan, members of the committee. Chairman Sullivan, it is wonderful to see you in this role, as opposed to our former role as attorneys general.

Senator SULLIVAN. You, too.

Mr. BULLOCK. And I do want to thank you for the opportunity to offer my perspective on this topic of significant import. I'm here today not only as Governor of a State that has great diversity of wildlife and many experiences with the Endangered Species Act, but also as the Vice Chair of Western Governors' Association, an organization that really does embody my idea of bipartisanship.

WGA has recognized by resolution that the ESA can only be reauthorized through legislation developed in a consensus fashion that results in broad bipartisan support and maintains the intent of the Act. That continues to be our position today.

Looking forward, the stories of two different species on my landscape in Montana might provide lessons as you consider steps that Congress could take.

First, I think we need to do everything that we can to make certain that species aren't listed in the first place, and the committee and Congress should double down on their efforts as far as tools and assistance you can offer to incent private landowners and States. My case study for that proposition is the Arctic grayling. In the lower 48 States, remnant populations remain only in Montana, by the 1930s, less than 15 percent of their historic range.

Last August, the Fish and Wildlife Service determined the Arctic grayling was not warranted for listing. This is arguably one of the most significant ESA success stories in the Nation because State and Federal agencies and key partners developed close relationships of trust with 30 key landowners in the Big Hole Valley, covering 156,000 acres. Those landowners, many of them, voluntarily gave up water rights they are legally entitled to use to conserve this fish. It was possible because of landowner agreements authorized by the ESA to encourage conservation of non-Federal land to prevent listing. Under these agreements, Montana and other partners improved habitat, water flows, took other helpful steps. Some critical seed money came from State wildlife grants which are allocated by congressional appropriation.

The Fish and Wildlife Service touts these agreements, the Canada Conservation Agreements, with assurances, this is an example, as an important tool for working with landowners on endangered species conservation, and I agree. The question is what more can we do to incent voluntary efforts to protect species before the ESA ever comes into view. And is Congress willing to increase funding for State agencies to work on that active collaborative habitat efforts for risked species? I hope and think that you should. We know

that with sage-grouse, the NRCS and sage-grouse initiative will play a critical role. We need to be looking to provide other tools and making these agreements easier to administer.

Second, let's recognize when the Act has served its intended purpose, then trust the States to manage the animals within their borders thereafter. The case study for that is the grizzly bear, a success story for recovery which still remains listed. The Governor and I often fight about water, but we don't fight about at least the grizzly bear.

We are certainly working out our differences with Fish and Wildlife Services. I am optimistic that we are going to find a path forward for delisting. There are many aspects of that story that are positive, like the private landowners that are engaged demonstrate a remarkable commitment, but the grizzly bear needs to be delisted and returned to State management. Our States hold our fish and wildlife resources in trust for all of our citizens. It is a responsibility that we take so very seriously. The delisting process must become more straightforward so we can spend our collective resources on species that may need more attention.

It is worth noting that I have offered two instances where the ESA has actually worked or is working. But the Act could certainly work better, and we could do more to leverage the role of State and private partners into more resources on the ground for species conservation. After all, the hard work really is on the ground and in the community, not always in the legislative halls.

Just last week I did have the opportunity to join the Secretary of Interior in announcing the greater sage-grouse was not warranted for listing under the Endangered Species Act. As I sat with my fellow Governors, Governor Mead, Hickenlooper, and Sandoval, I couldn't help but think how logical it was for the Western Governors Association to tackle these issues, attempt to build a regional consensus, as Governor Mead has proposed with his chair's initiative; and I will certainly support him in those efforts. Meaningful efforts to address the pitfalls and the possibilities of the ESA must begin around conference room and kitchen tables, determining first what works on the ground.

Finally, it is worth remembering that the Endangered Species Act was signed by President Nixon in 1973, who recognized the Act as an important commitment by our Nation to conserve and protect the rich diversity of animal and plant life for future generations. That noble goal does still hold true today.

Thank you again for this opportunity to appear before the committee.

[The prepared statement of Mr. Bullock follows:]

**Before the
United States Senate
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works**

**Briefing on Improving the Endangered Species Act:
Perspectives from the Fish and Wildlife Service and State Governors**

Testimony of Montana Governor Steve Bullock

September 29, 2015

Chairman Sullivan, Ranking Member Whitehouse and Members of the Subcommittee, on behalf of the citizens of the State of Montana, I want to thank you for the opportunity to offer Montana's perspective on this topic of great import.

Montana is a vast and varied state of mountains, canyons, river valleys, forests, and badlands, making it rich in beauty and resources. It is known as "Big Sky Country" as it covers an area of more than 147,000 square miles, making it the fourth largest state in the United States. Our diversity of wildlife and fisheries follows suit, and folks come from around the world to fish for trout and paddlefish, hunt for elk and antelope, or catch a glimpse of a Grizzly Bear, Gray Wolf or Mountain Goat.

Charming towns and bustling cities serve as gateways to Montana's natural wonders. With one of the most diverse geographies of any state in the country, Montana is home to both Glacier National Park and the gateway to Yellowstone National Park, making it a popular tourist destination. In fact, tourism is one of our leading industries. Nearly 11 million people visit us each year with an economic impact of nearly 4 billion.

But there is much more to Montana than our spectacular, unspoiled nature and vibrant and relaxed small towns. Montana also has a strong, diverse, and growing economy. Major industries include agriculture, energy production, manufacturing, education, and healthcare. Montana is known best as the “Treasure State” due to its rich deposits of mineral wealth, fertile valleys for agriculture, and vast timber resources. But it also produces a significant amount of intermediary and finished products, including industrial chemicals, machinery and metals, and food and beverage products. High-tech industries, such as biosciences research and development, software, and photonics manufacturing are also becoming integral parts of the state’s economy.

Long before Montana became known as the “last best place,” Indian nations and Indian people knew this area as “the first best place.” Montana is home to 7 Indian reservations and the state-recognized Little Shell Tribe of Chippewa Indians. Since becoming Governor, I have appointed 116 Native Americans to serve on many of Montana’s most important state boards, council and commissions and am proud to have worked closely with a bi-partisan coalition in the state legislature to create jobs and improve education throughout the state of Montana, including Indian Country.

Montana’s higher education system boasts sixteen institutions: two universities, four regional universities, and ten two-year and tribal colleges, which serve 47,000 students and employ more than 7,000 faculty and staff. Montana State University in Bozeman and the University of Montana in Missoula have been ranked among the best places to live by Outside Magazine and among the top colleges by the Best College Review.

Montana was ranked #1 for overall best colleges in the country last year. Students come to Montana not only for the quality academic experience, but also for the unparalleled quality of life.

World-class recreation, rich culture, friendly people, great jobs, and amazing schools – there is truly no other place like the Big Sky State.

But I appear today not only as the Governor of a great state that has a great diversity of wildlife and many experiences with the Endangered Species Act, but also as the Vice Chair of the Western Governors Association, an organization that embodies my idea of bipartisanship. So let me first offer a few observations about WGA.

Shortly after taking office, my staff and I engaged with WGA on our first substantive policy resolution, relating to the Endangered Species Act. There was much spirited discussion and we worked hard to come to agreement. It was perhaps at that moment that I started to understand the power of WGA and its commitment to bipartisan principles. Indeed, that Resolution (No. 13-08) provides on page 3:

“After working through their own strongly-held differences in how the Act should be renewed, Western Governors believe that the ESA can only be reauthorized through legislation developed in a consensus fashion that results in broad bipartisan support and maintains the intent of the Act.”

That continues to be our position today.

Governors, as Chief Executives, offer concrete perspectives on issues that affect their states. Wildlife management is something we hear about from Montanans every day in our office and for good reason. Montanans are outdoors people, and few things stir our passions like our wildlife. Montanans not only fish and hunt, but they like seeing their wildlife and they know how important our wildlife and fisheries are to our economy and to our way of life.

Our state holds our fish and wildlife resources in trust for all Montanans, and it's a responsibility we take seriously. We're proud of our wildlife heritage – one that includes almost every wildlife species that was present at the time Europeans were first observed on our landscape by Native Americans.

Western Governors share many views on wildlife issues because our economies, communities, landscapes, and quality of life are intertwined in ways that bring us together. We may talk about these issues in different ways, but when we spend time working on them together, we're often closer than we think.

When the management of a wildlife species is taken over by the federal government, there are costs and responsibilities that are born by the state and its citizens – and the impacts to our economy, jobs, and way of life can be significant. But we also feel as if we've lost something that was ours, or maybe even failed at something we should have done better.

Governor Mead has outlined an ambitious initiative for the WGA, but it's not solely focused on the track record of the Endangered Species Act – it starts where any discussion of species management should start: by examining how the states are doing now in the management of those species. Starting there, my goal is to

make sure we consider how we can promote and improve species conservation efforts, before the ESA comes into play.

Looking forward, I see two significant challenges for species management: a changing climate and declining federal resources.

Regardless of what you think about climate change (and I believe in it), there is little doubt that issues relating to forest and land health and water management are becoming more acute, and the implications and challenges for our wildlife species are becoming more pronounced.

At the same time that wildlife and species management issues are becoming more pressing, the federal agencies have fewer resources. That isn't to suggest that the states have unlimited resources. Montana has been recognized as the most fiscally prudent state in the nation-- we got there by running a tight ship, which is what Montanans expect. Our unemployment rate is 4.1 % and our wages are growing faster than all but 5 other states. While other states are managing billions of dollars of debt, I'm proud that we have been able to manage the state's resources, grow the economy and set aside a healthy amount in a rainy day fund. We have also transferred \$50 million to a dedicated fire fund—allowing us to weather the increased fire activity that's been seen in the West without cuts to other areas in the State's budget to cover those costs.

We can't lose sight of the fact that with species management an ounce of prevention is often worth a pound of cure. Funding work now relating to species conservation can often head off expensive fights later over the status or needs of that species, and there are several examples in Montana where relatively small expenditures of money up front prevented major conflicts later on.

For example, in 2009 the USFWS was petitioned to list the northern leopard frog under the ESA. There wasn't a lot of information available regarding abundance. Montana conducted surveys, by matching an estimated \$25,000 of state funds with \$50,000 federal from the State Wildlife Grants Program monies that are allocated by Congressional appropriation. As a result of those surveys, in 2011, the USFWS made a not warranted finding.

In Montana we've had a lot of experience with species management and subsequent federal involvement under the ESA, that will be helpful as this discussion moves forward.

Just last week I participated in the Secretary of the Interior's announcement that the Greater Sage-Grouse should not be considered for listing under the ESA. In Montana over 70% of sage grouse habitat is on private or state land so this is a big victory for private property owners in my state, as well as our school trust.

As good as that decision is, there's much behind it that could point the way to stronger state/federal partnerships and more resources for species conservation. Former Interior Secretary Salazar invited the western states to the table to try and build a collective effort by the state and federal agencies, as partners, that would keep the bird from being listed.

My colleagues Governors Mead and Hickenlooper had the good sense to take him up on it. Montana came late to that effort, and I can tell you it was difficult and grueling work.

In the end the process was not perfect. I was frustrated with the land use plans from the Bureau of Land Management, and a few of my colleagues feel like they were not adequately heard. But it offers promise as a new model for greater state involvement, leveraging shared resources, and getting ahead of species management issues before they become problems we can't solve together. And let's remember that the end result is that the sage grouse doesn't need to be listed in significant part because the federal government trusts the state's management plans will work. That is success.

And then there's the Arctic grayling. In the lower 48 states it was historically found only in the Upper Missouri River and Michigan. By the 1930s it was reduced to approximately 15% of its historic range, and remained only in Montana. Of the remnant populations in Montana one of the most at risk was in the Big Hole River, where the majority of grayling reside in rivers along private land. In August 2014 the US Fish and Wildlife Service determined that the Arctic grayling was not warranted for listing under the ESA.

The conservation of grayling in the Big Hole Valley is arguably one of the most significant conservation and ESA success stories in the Nation. State and federal agencies and key NGOs developed close partnerships and a relationship built on trust with 30 key landowners in the Big Hole Valley, covering over 156,000 acres.

In the west, whiskey is for drinking and water is for fighting. Yet in the Big Hole Valley, a number of landowners voluntarily give up water rights they are legally entitled to use in order to conserve grayling. As a result, during drought years grayling survival is improved. Without this voluntary action, the grayling trend in the Big Hole River would not have improved, and would continue downward toward extirpation.

This was possible because of a Candidate Conservation Agreement with Assurances (CCAA), authorized by the ESA to encourage conservation on non-Federal land to prevent listing under ESA. Under the CCAA, Montana spent over \$6 million to improve riparian and in-stream habitat, water flow levels, connectivity, and to minimize fish entrapment in irrigation ditches. Some of this critical seed money came from State Wildlife Grants, allocated by Congressional appropriation.

The USFWS touts these agreements as an important tool for working with landowners on endangered species conservation, and I agree. The question is: what more can we do to incent voluntary efforts to protect species before the ESA comes into view?

Wolverines have always been present in and around Montana at low densities, and in recent years have been expanding their range and even slightly expanding their numbers. But in 2013 the USFWS proposed to list the species as threatened, asserting that over time climate change would destroy the animals' remaining habitat.

I have no doubt that we need to act to confront climate change for a whole host of reasons, not the least of which is preventing fundamental ecologic change. But the Act was not designed as a regulatory mechanism to address or solve climate change. It is not possible to recover a species when the threat cited as the cause for listing cannot be ameliorated by the actions taken under the Act.

Fortunately pragmatism prevailed. In 2014 the USFWS concluded that it could not reliably predict the impacts to wolverine populations from climate change, and the proposed listing was withdrawn. Nevertheless, the question of whether it is appropriate to use climate change as a basis for listing, and if so, how to do that in a way that makes sense, remains.

Finally, it's worth mentioning Grizzly Bears, a success story for recovery but which still remains listed. We're working out our differences with the USFWS, and I'm optimistic that we'll find a path forward soon for delisting. There are many aspects to this story that are positive – like the strong state and federal partnerships that have formed to manage the Great Bear, and the private landowners that have engaged and demonstrated remarkable commitment. But the Grizzly Bear needs to be delisted and returned to state management.

The successful recovery of this species shows us that the delisting process must become more straightforward, so we can spend our collective resources on species not yet recovered.

There are other stories from Montana. Other success stories like the bald eagle and peregrine falcon. Challenges like the gray wolf which, after being reintroduced had to be delisted by Congress, but is being successfully managed today.

Other stories like the bull trout and the lynx, where the ending is still to be written. And other challenges like litigation and consultation that also deserve scrutiny.

Last week, as I joined with fellow Governors Mead, Hickenlooper, and Sandoval as Secretary Jewell made her historic announcement regarding sage grouse, I couldn't help but think how logical it was for WGA to tackle these issues and attempt to build a regional consensus, as Governor Mead has proposed.

It's worth remembering that the Endangered Species Act was signed by President Richard Nixon in 1973, who recognized the Act as an important commitment by our nation to conserve and protect the rich diversity of animal and plant life for future generations. That noble responsibility still holds true today.

Thank you again for this opportunity.

Environment and Public Works Committee
Briefing entitled, "Fish and Wildlife Service: The President's FY2016 Budget Request for the Fish and Wildlife Service and Legislative Hearing on Endangered Species Bills"
Questions for the Record for Governor Steve Bullock
September 29, 2015

Responses of Montana Governor Steve Bullock to Written Questions from Chairman Inhofe:

1) There has been considerable criticism of the restrictive nature of BLM's land use plans that were signed at the same time as the not-warranted decision. What impact do you anticipate for oil and gas development in your state as a result of these plans?

Answer: Unlike most states in sage grouse country, the majority of habitat in Montana is found on private and state land. In fact, over 70% of sage grouse habitat is on private and state land. These lands will be governed by the Montana Sage Grouse Habitat Conservation Program, which balances economic development with protection and was supported by, among others, the Montana Petroleum Association. The decision by the United States Fish and Wildlife Service to not list sage grouse under the Endangered Species Act was a significant victory for private land owners and the state schools trust, which is where a significant portion of the oil and gas development in the state takes place.

2) There has been some economic analysis that indicates that the land use plan impacts would be expected to exceed that of what would have resulted from a listing decision for greater sage grouse. What is your response to that analysis?

Answer: I have never heard of a situation where a landowner or any other economic entity preferred a listing under the Endangered Species Act to a not warranted determination. As noted above, over 70% of sage grouse habitat is on private and state land. These lands will be governed by the Montana Sage Grouse Habitat Conservation Program, which balances economic development with protection. I have not seen a credible and comprehensive economic analysis that would show a listing to be an improvement over a not warranted determination, at least as far as Montana is concerned.

3) There was a great deal of dialogue from governors regarding their view that the economic outcome and the recovery of the bird would have been better off by deferring to state sage grouse plans. What reforms need to be in place to ensure that states have a greater role in listing decisions?

Answer: Wyoming Governor Matt Mead will be leading a comprehensive and bipartisan review by the Western Governors' Association of the Endangered Species Act and how it could be more effective. I look forward to supporting and participating in that discussion. I am sure, given our experience with sage grouse, that this issue will be part of that inquiry.

4) Would species recovery be better served if states have a far greater role under the ESA?

Answer: States have broad trust responsibilities over wildlife species within their borders and often have more on-the-ground knowledge about those species, and thus should always have a very significant role in

their recovery. Further, climate change is making the management of wildlife species more difficult, and the resources available to federal agencies are declining. At a minimum, stronger and more robust partnerships between the state and federal governments will be required in the future if we are to successfully protect our wildlife heritage.

5) Do you believe that data on behalf of state wildlife agencies should be given the same weight and deference as that of FWS data in listing determinations?

Answer: In all determinations under the ESA, the best data and science should always be used and accorded significant weight and deference.

Senator INHOFE. Thank you, gentlemen, and thank you again for your leadership on this issue. I think it is a great opportunity in terms of the Western Governors' Association's focus on this issue with your ideas. I think a lot of times the best ideas come from the ground, come from the States, some we are going to be very, very open and encouraging to hear what your suggestions are with regard to reforming the ESA.

I do want to start by just asking you, in your experience, and I think a number of us have experience from different times working at the State level, have you seen the consultation, particularly when it comes to listings, that is required by the ESA by Federal agencies, whether it is Fish and Wildlife or some of the agencies, or, in your experience, has it been more of an afterthought with regard to a listing, and then they come and explain it to you later? This, at least in my experience, has been a frustration because, as the two of you mentioned, a lot of times the States have more information. You know, Director Ashe talked about science. Absolutely. But more science and a sense of how it is going to impact the local communities better than folks in Washington do. I am curious what your experience is, both of you, on that issue.

Mr. MEAD. Thank you, Mr. Chairman. I guess I would say not just during my time, but what I am aware of, it has been somewhat inconsistent. Having said that, I mentioned wolves, I mentioned grizzly bears, the greater sage-grouse. The level of the consultation on those three species, for example, we couldn't ask for more. As a matter of fact, I viewed it, these last couple years, a good day when I didn't mention the word sage-grouse, because we were so involved with the Federal agencies, and they with us on that issue.

So I think that, as I said, and you brought up the Act does require that. It absolutely requires that. That, as I have said, I think historically, I think that may be hit or miss. I would just tell you my experience on those three species, there has been no question about the consultation, which is a different question than agreement.

Senator SULLIVAN. Right.

Mr. MEAD. But had the consultation.

Senator SULLIVAN. Governor Bullock.

Mr. BULLOCK. I would say certainly not enough consultation when the decision goes contrary to what I believe it should. Beyond that, I can point to a number of instances, 2009, a leopard frog, where it was being petitioned. You are looking at it. Actually, it was with one of the grants that are provided by Congress. We had the opportunity to do some more studying, and ultimately it didn't end up listed. The Arctic grayling was another one where we actually worked together, and I think that that would be consultation.

So sometimes it works, sometimes it doesn't, but it is something that I think that Governor Mead and we all should be looking at over the next year to ensure, because I think as you pointed out in the opening Chairman Sullivan, section 6 of the Act says you must be consulting with States, and we as States certainly think that is essential. And our fish and wildlife scientists and managers are on those landscapes and working hard for decades, some of

them, as individuals, so we do know what is happening in our individual States.

Senator SULLIVAN. Let me ask kind of a follow up, take this a little bit further on two ideas for ESA reform. You both alluded to them in your testimony. One would be a stronger role for States, even as far as an agreement with the Federal Government on a listing decision, whether as a group of States or, as I mentioned, if there was a species that was solely residing in somebody's State, to have a co-decisionmaking authority. I am wondering if you have thoughts about that. You know, Director Ashe mentioned, well, that doesn't happen now. Well, it doesn't happen now because the law doesn't allow that now. But the law could allow that if we amended the law.

Second, in terms of judicial review, I think, Governor Mead, your point is a really good one, that you can even get to the point with Federal agencies and different groups of what you might agree with regard to a species, whether to list it or not, the recovery plan, and then all of a sudden it is thrown into litigation in the D.C. Circuit or the Ninth Circuit and it becomes almost a craps shoot; three judges who don't know much about any of our States, usually, making a call on something that we have spent months or even years working on.

What are your thoughts on reforming the ESA with regard to those two issues?

Mr. MEAD. The court system is problematic for me because I have thought about if I could just change the law myself, I thought I would like a very strong presumption that if the States and the director agree something shouldn't be listed, it shouldn't be. But I don't necessarily want it the other way. So I have had a hard time trying to figure out how exactly how I want that. But I would say this. I think that that problem is significant because the coalition we built to get the plan for the gray wolf, it was not just ranchers, it was sportsmen's groups, it was environmental groups.

Senator SULLIVAN. Right.

Mr. MEAD. And we spent a year putting that together and then getting it through the legislature and getting buy-in, and we worked on the conservation plan, how are we going to go about this. So we were all set and the secretary and the director with me. And then a year and a half or 2 years after the fact it is all collapsed.

Now, how am I going to go back and build another coalition? How am I going to go back and get a conservation plan? That is a significant problem. We don't know the answer to that yet, Mr. Chairman, but one thing that would certainly help is before there is a listing, one, it should be a single listing rather than a multiple listing.

Senator SULLIVAN. Right.

Mr. MEAD. Western Governors also think that before a listing is made, that whoever is proposing the listing, that they get all available scientific data from the States; that they don't just throw it out there and then go on a fishing expedition, they get that from the States. The States have incredible good data. Our Game and Fish department, I think, is as knowledgeable on the wildlife in Wyoming as anybody. That they have that. That they not only have

that, they put it together. That they notify the States before they actually make the request of the Fish and Wildlife Service so that we are aware of them. That would be not only good for the States, but, frankly, if a species needs to be listed, don't do it in a haphazard fashion; get that data, get the scientific data, all the data that is debatable, before you are allowed to list a species. And you can only list one species rather than all these species and which science applies to which species.

Senator SULLIVAN. Great.

Governor Bullock.

Mr. BULLOCK. I largely concur. You know, I said at one point, when I was running for office, there are two ways to become a biologist: one is to go to years of school and the other is to run for office. And I say that only inasmuch as wolves are recovered in Montana, or delisted, but there were so many individual officeholders and folks that really said, as individuals, that they had all of the answers. I think science has to guide this, and science, though, back to the initial question of individual consultation with the States. I am not sure that it should be vested entirely over to the States.

Senator SULLIVAN. Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman.

I plan to be here for the remaining of the meeting, so I would invite Senator Barrasso to go ahead.

Senator BARRASSO. Well, thank you very much, Mr. Chairman. Thank you very much, Senator Inhofe.

Thank you both for being with us today to share your remarks. I appreciate your positions of State leadership through the Western Governors' Association; I think provides us a valuable perspective regarding on-the-ground consequences of the Endangered Species Act.

I would like to point out that Director Ashe has stayed, and it is a tremendous credit to him and the respect he has for both of you, because so often Administration witnesses come, testify, and leave, and don't have the benefit of hearing all the things that you said. But I am sure it is the personal respect that he has for both of you and the relationship that you have developed working together.

And I would say that Director Ashe is not a typical member of this Administration; I think he has been a partner to work with. He hasn't been always able to get everything done, but you heard from his answers today the respect for what Wyoming has done with respect to the gray wolf and realizing that we have done the job that anyone has ever asked of us.

Governor Mead, first of all, I would like to say I really appreciate your work with Fish and Wildlife to ensure the sage-grouse determination was "not warranted." You spoke about the way Fish and Wildlife has approached conservation of the gray wolf and the grizzly bear in Wyoming. Specifically, you mentioned some of the economic burdens placed on States, specifically the State of Wyoming, when recovered species remain listed. So could you provide maybe a couple of examples of why the Endangered Species Act places economic burdens on State and local governments?

Mr. MEAD. Well, I will give you an example using the sage-grouse, Senator Barrasso. We export more BTUs than any other State. We are proudly an energy State, and we are proudly the No. 1 coal producer. But if the sage-grouse would have been listed on the maps that we showed, 80 percent of the coal available, coal mines, would have been affected by that listing. Two-thirds of potential oil and gas developments in our State would have been covered by that listing. When you are a State that exports that much energy, to take away or reduce two-thirds of your oil and gas, reduce 80 percent of your coal is significant, significant economic burden.

Those are just dollars that you can sort of point to. But what you cannot calculate, Senator Barrasso, that is real is lost opportunity costs. How can I tell a company you can come into Wyoming and you can start your development, but I don't know if you are going to get it through in 1 year, 3 years, 5 years, or a decade? I can't calculate that. I can't calculate that loss to our economy. I can't calculate that lost opportunity cost.

And if I was able to tell that company, listen, we have a plan, a recovery plan that is in place, here is how you reach the goal line, and here is how long it is going to take you, then they can make that choice. But when it is an open-ended question, Senator, it may be 5 years or 20 years—and just on the gray wolf, how many years have we been in court? It has been a number of years—that has a huge economic cost that we cannot calculate but we know is very real and very hurtful to the economy of Wyoming and to the West.

Senator BARRASSO. You know, I asked Director Ashe about moving targets. I don't know if you would like to comment at all about moving targets, if that has been a frustrating process for our State in how we try to deal with and meet Federal goals that I believe keep changing.

Mr. MEAD. Director Ashe and I have a little bit of a different point of view on the grizzly bear and whether the target was moving or not. What I would tell you, Senator, is we have negotiated that number where we were. As you recall, I think it was 2010, the court sent us back and said we have to look at the white bark pine and how it affects the grizzly bears. That study was done; we showed white bark pine was going down, the grizzly bear population was continuing to go up. And the estimates on grizzly bears, it depends who you talk to, but we were looking at 300, then 500. Now we think we have over 1200 bears. And there is no question by any account that we have whatever goalpost they set in the past, we have passed it or even doubled it. And there is an economic impact on that as well, because we care about wildlife, and you have to have a balance in wildlife. You have to have States manage wildlife. And when you have over-population of grizzly bears or wolves, it hurts your moose, it hurts your elk, it hurts your livestock.

And, frankly, I think it is also an important point, Senator Barrasso, to point out the grizzly bear deaths that we are experiencing have increased dramatically over the last 5 or 6 years because of the conflict, because of the number of grizzly bears. So people come to me about that, and it is tough as the Governor of

a State to say I don't have the authority to manage grizzly bears or any other species in my State.

Senator BARRASSO. Governor Bullock, anything you would like to add to that?

Mr. BULLOCK. No, I think Governor Mead hit it well. Director Ashe may be here just because he is afraid of what he and I might say.

[Laughter.]

Senator BARRASSO. Anything you would like to add, since he is here to listen to what you would like to say?

Mr. BULLOCK. No, no. From that perspective, no. In all sincerity, I think that Governor Mead nailed it. That is one of the things, we have to work together. The grizzly bear population extends, it is not limited to Wyoming or Montana, as we share this park; and I think that we have worked together. I am optimistic that it is going to get done, but it is the same frustration at times saying that where I think we can go, I think more than looking backward, is looking forward, which hopefully is what this initiative will really do, in part, is say when is enough enough. And we in the Western States have so many, especially from the wildlife trying to manage this, can we offer anything constructive as we work together for your all's consideration.

Senator BARRASSO. OK, thank you to both of you.

Thank you, Senator Inhofe.

Thanks, Mr. Chairman.

Senator SULLIVAN. Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman.

I think we better be a little careful here, because my saying all these nice things about Director Ashe, and then, of course, Barrasso doing the same thing, we might impair his relationship with his superior.

Nobody gets it?

First of all, were the two of you here when we had Director Ashe on the stand?

Mr. MEAD. Yes.

Mr. BULLOCK. Yes.

Senator INHOFE. OK. You might remember I brought up the issue on when you are looking at things that might happen in the future, and he said we base it on the best science available. Remember that discussion that we had? Of course, they are now looking at climate change as something that absolutely is going to happen. You know, it is funny to watch all these people. We had a hearing this morning where, one by one, each one was talking about, oh, yes, it is a fact, science is settled, and all that. Well, science isn't settled. Everybody knows that. In fact, everybody knows it. The polls show, this Gallup poll, the most recent one, it used to be that climate change or global warming was always No. 1 or No. 2. Did you know in the March poll of Gallup, the same criteria, dead last, right after tropical rain forests? In their general poll it was number 15 out of concerns for America, out of 15 concerns. So the people know better.

My concern is this. Not to try to plead a case that the science is not settled, but when they are making decisions that are predicated on the assumption that certain things are going to happen,

then we find out that the IPCC, the Intergovernmental Panel on Climate Change, was the basis of all of that information and that science, after Climate-gate totally destroyed their reputation, I wonder how this can happen. It seems to me that it is kind of arbitrary. And as I observed in the first panel, it looks like that is not going to change until we have a different Administration.

Now, I only bring that up because from you guys, from a Governor's perspective, you have to be really concerned, because they are making decisions that have huge effects, as both of you have said, on you, on your State, on the job that you are doing; and yet it is predicated on something you may or may not believe in. So it is just not a matter of looking to see what is happening to the numbers of a species that is out there; it is a matter of how you can project something that might happen in the future and thereby do something that you otherwise would not want to do.

I am not sure I am making sense with that, but I am concerned with that.

Both of you agree that the States do things better than the Federal Government. Having served on the State level, I even take it down one more step—the closer you get to the people. When I was mayor of Tulsa, there wasn't any hiding place there; we knew exactly what people thought and what we could do better.

Now, why don't you each one kind of outline what areas you believe the States are better than the Federal Government in terms of giving us some ideas so that when the time comes we can make some changes, real changes, to the Endangered Species Act? We can kind of use that. Maybe make a couple of comments and then elaborate for the record.

Mr. MEAD. Well, thank you, Mr. Chairman, Senator. I will do my best to answer that question.

One reason I think that States are better at managing wildlife is just sheer numbers. Our folks that work for our Game and Fish are always going to be more in terms of just raw numbers than the Fish and Wildlife Service would have available.

Two is, in Wyoming and I think Western States, we view the wildlife as belonging to the citizens of Wyoming. And the track record of our Game and Fish and the data that they have collected, the expertise on which they work on everything from mule deer populations to brucellosis, provides to me a track record that is real for each individual State that I view as the best data available and the science available.

Two is that when we have, for example, a situation where there is a question on a species, whether it should be listed or delisted, the people that I go to first always are my Game and Fish.

So, Senator, my best answer is by practice and I think the history of Game and Fish Departments across the Western States, because we take such pride in our game and fish, that is where the action is. That is where the data is, that is where the science is, and that is why I think it is very important, before a listing is made, that whoever is petitioning to have a species listed, gather that data up and have all that hard data available.

Senator INHOFE. Do you agree with that?

Mr. BULLOCK. Yes, I would largely concur with Governor Mead. And I think that in some respects, when it comes to some of these

bigger issues, we are probably a little bit better on the ground, especially from the Governors' perspective as executives, because we have to. I mean, we can have theoretical discussions about sage-grouse and the Endangered Species Act, but at the end of the day we in Wyoming and other States, many other States did the same thing, did the hard work of bringing together from the petroleum industry to conservationists to everybody because we need to get this done. So we are both closer to the ground and we have to get work done.

Senator INHOFE. Governor Bullock, you mentioned, along with the decision, the greater sage-grouse, that it doesn't warrant protection under the Endangered Species Act. Then right after that BLM comes in with its land program, which I think, if I look at this, talking about the buffer zones around there, could be even more serious than if they had determined a listing for the sage-grouse. What do you think?

Mr. BULLOCK. Mr. Chair, I don't know that it would be more serious. In some respects it has been interesting hearing so many folks that it almost seems like they are upset that there wasn't a listing. In Montana, if I look at it, over 70 percent of the sage-grouse habitat is on private or State land, so less than a third of it, less than 30 percent, is BLM land. So by ensuring that this listing is not warranted, we are actually providing certainty in private property rights, in economic opportunities and other things, for those landowners in Montana.

Now, I expressed my frustration with the BLM plan. Also, though, because we haven't been working on it for the 7 years that Wyoming has, also have gotten, from my perspective, I said as we are executing this plan, I expect to be able to have continuing conversations with the Bureau of Land Management to make certain that we are managing as a landscape, not depending on who actually owns the properties.

Senator INHOFE. Mr. Chairman, I appreciate that. You know, Oklahoma is a farm State, and I have a hard time when I am around the State and people ask questions that we are protecting the burrowing beetle. You know, we can talk about grizzly bears, and, by the way, we have a real serious problem in Oklahoma: we don't have any. They are really in danger there.

Mr. MEAD. We have some we can loan you, Senator.

[Laughter.]

Senator INHOFE. But, you know, it is kind of hard to answer the questions why is it, when plowing our fields or if we are out exploring for oil, we are building roads, we have to build around these things because of the habitat of a beetle? So it is a frustrating thing, and I am hoping that you and I are going to be in a position to overhaul the system. We have talked about it for a long time. I think now it is time to do it. And you would be a big part of that, both of you.

Thank you, Mr. Chairman.

Senator SULLIVAN. Thank you, Senator Inhofe.

Let me conclude with just a couple of questions. In my experience, this issue, ESA reform, is a very bipartisan issue. Unfortunately, none of our colleagues on the other side of the aisle made it to the hearing today, but whether it was our time, Governor Bul-

lock, in the Western Association of AGs, or in the Western Governors' Association, is that your experience as well? Because what we are trying to do, and hopefully you are seeing the tone in this hearing, we are trying to get ideas, trying to be very bipartisan. You know, a lot of discussion on Director Ashe here. I think we certainly want to work with him on this. He knows that he and I have some not just small disagreements, some fundamental disagreements on some other issues, the 1002 area of ANWR and ANILCA and things like that.

Don't worry, Director Ashe, we will get to other hearings on those important issues.

But I do think it is important, even though you don't see any of our colleagues on the other side. This is not some kind of partisan issue that we are trying to hold a hearing on where there is no interest. In my experience, but I am really interested in yours, from your constituents, in working with Democrat and Republican Governors, what is your experience in terms of the bipartisan desire for reform here?

Mr. MEAD. Thank you, Mr. Chairman. I think if you look at the resolutions which we submitted as part of our testimony, you will see very strong bipartisan support on how we improve the Act, and our plan, so you know, Mr. Chairman, is by June of next year we will have some resolutions and some recommendations which hopefully will be of use to you as Chairman and to this committee. But it is not, and I think it is not just by chance that Governor Bullock and I are here together, because we have had the same frustrations. We have had some same success, and it is a bipartisan issue.

And my goal is not, so you know, to say we don't need an Endangered Species Act.

Senator SULLIVAN. Right. I don't think that is any of our goal.

Mr. MEAD. My goal is how do we improve it for the species, how do we improve it for our citizens, how do we improve it for industries and businesses. And I think there is ground to be had there, and in a bipartisan fashion we are going to come together, we are going to debate this and hopefully be of help to you, sir.

Senator SULLIVAN. Great. I think that is a great plan moving forward.

Let me just ask on two more specific issues. I did ask previously. You know, I know it is an idea that people just almost, out of hand, disregard. I certainly don't think it should be disregarded but, again, going back to the issue of State input, State involvement, State signoff. Again, we come from States where our fish and game agencies are some of the best not only in the country, but in the world, and we come from States where people care passionately about the species and protecting the species. But as you two know, being on the ground as Governors, you also see the balance of the issue of jobs and an economy, and wanting to make sure our kids can live and grow up in the States where we live and serve.

So back to the two questions I had asked earlier. Do you think there would be support from a bipartisan group of Governors to have States be involved to the degree to which there needs to be a joint agreement between a Federal agency and the senior State executives on a listing or delisting?

Mr. MEAD. Mr. Chairman, I will speak now not as Chairman of the Western Governors', but just as Governor of Wyoming.

Senator SULLIVAN. Right.

Mr. MEAD. Anything you can do to provide more opportunity for the States to play a bigger role in this I would be for. The challenge would be some of these species don't recognize State boundaries.

Senator SULLIVAN. Correct.

Mr. MEAD. So I could say, Governor Bullock, I want this species listed, and Governor Bullock would say no. And Governor Otter would probably say no on anything.

[Laughter.]

Mr. BULLOCK. Inside joke.

Mr. MEAD. I am sorry, Mr. Chairman.

Senator SULLIVAN. Just for the record, Governor Otter is not here to defend himself.

Mr. MEAD. No, he is not, but he can defend himself at another time.

Governor Otter, the three of us, especially sharing Yellowstone, we may have different points of view. And while the three of us get along very well, the next Governors may, for whatever reason, not have the same sort of cooperative relationship, and then you get into the question who does that. So I do think you still, Mr. Chairman, have to have a system where the director says this is what we do.

But I would say this: there is a lot of room for more State input. I would love to have the opportunity, and this is one of the considerations for the director to consider, is does the State say yes or no to this listing.

Senator SULLIVAN. Right.

Governor Bullock, do you have a thought?

Mr. BULLOCK. No, I thought Governor Mead was well thought out. Active participation, active consultation. We do have challenges with boundaries. But I think it is something that we undertake sort of our exploration over the next year, because another thing about Western Governors is that we are not fearful of expressing where we think additional State sovereignty should be recognized, but it is something that we should put on our task list to say what can we come back and say could be meaningfully.

Senator SULLIVAN. Well, I am in agreement with you on the issue of State involvement. In the instance of my State, there are a lot of times where we are not sharing borders with anybody but Canada, so there are instances certainly in Alaska where we are the only State impacted on decisions. I think there could be room in the reform, whether it is Alaska or other States where you are the only State impacted with the Federal Government that you could have some kind of co-designation authority, and I think that is something that we certainly want to explore.

Let me just ask a final question. You know, Governor Mead, you did a really good job of kind of laying out this issue of uncertainty that can come from listing and trying to create economic opportunities in your State, and how this uncertainty can really negatively impact your constituents and jobs. Do you think that there should be more directly listed in the ESA? Maybe not, as Director Ashe noted, directly with regard to the listing, but the way in which you

deal in the aftermath of the listing that gives more focus on employment opportunity and jobs for our citizens?

And, finally, is there anything else in the 2013 resolution that you have laid out from the Western Governors' Association that we have not covered here today that you think it is important for the record to make sure that you highlight before we adjourn?

Mr. MEAD. Thank you, Mr. Chairman, for the latter part of your question. I think what we have supplied is pretty good of where we are now. We hope to add to that until June of next year. Your question is a great one.

Please restate. I am sorry, I totally lost the train of thought.

Senator SULLIVAN. On the issue of more direct reference in the Federal statute as it relates to job opportunities, the economy, employment of our constituents.

Mr. MEAD. Yes. You know, my answer from my standpoint as Governor of Wyoming is I think that there should be. It is not scientific and probably not even something that should bother me, but as we have tried to delist wolves, I will get letters from people of, say, for example, Chicago, who will complain about I am not doing a good job managing my State. Well, I think we have better wildlife than most States. But we in the West refuse to be a zoo. We have to feed the citizens; they have to have jobs.

And where we are now, it seems, with the Endangered Species Act, and you have heard this, I do not ascribe to it and I don't know of many people that do, but this notion of shoot, shovel, and shut up, which refers to if you see something, don't tell anybody, just deal with it. And that is very unfortunate because we should be at a point where, if you find a species that is threatened or endangered, that should be good news. And the way the system works, if it is always put on a few, a specific industry or a specific rancher or a specific community, they are never going to view the Endangered Species Act as good news. If there is a national interest, and there should be a national interest in protecting species, then you cannot put it all on one person or one State or a group of States. That is why I agree with Governor Bullock. If this is a priority, we have to put resources in it. We have to think of conservation.

Every time a species is listed, it should be viewed as a failure. Every time there is a conservation necessary to help species, that should be viewed as a success. We have to get away from this is the worst news possible to have an endangered species. But the reason that is so, it is viewed by Rancher A and Business B as this is over. What my grandparents and great-grandparents built is now over because this animal or this flower has been found. And we have to figure out how to get away from that so it is celebrated, we promote it, and everybody has a stake and vested interest in promoting species. That is where we need to go.

Senator SULLIVAN. Very well said.

Governor Bullock.

Mr. BULLOCK. Very well said.

Senator SULLIVAN. Great.

Well, listen, gentlemen, thank you very much.

Director Ashe, thank you for staying.

This is going to be an important emphasis on this committee. I certainly hope that you and others can help convince our colleagues on the other side of the aisle that this is an important bipartisan reform: good for species, good for the economy, and good for the country. And we are going to work hard on that in the coming months.

So I appreciate the outstanding testimony of the witnesses here. It is great having Governors in front of the Congress today.

The hearing is adjourned.

[Whereupon, at 3:54 p.m. the committee was adjourned.]

